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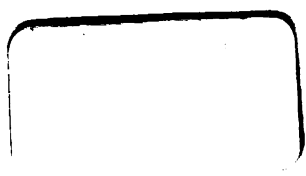
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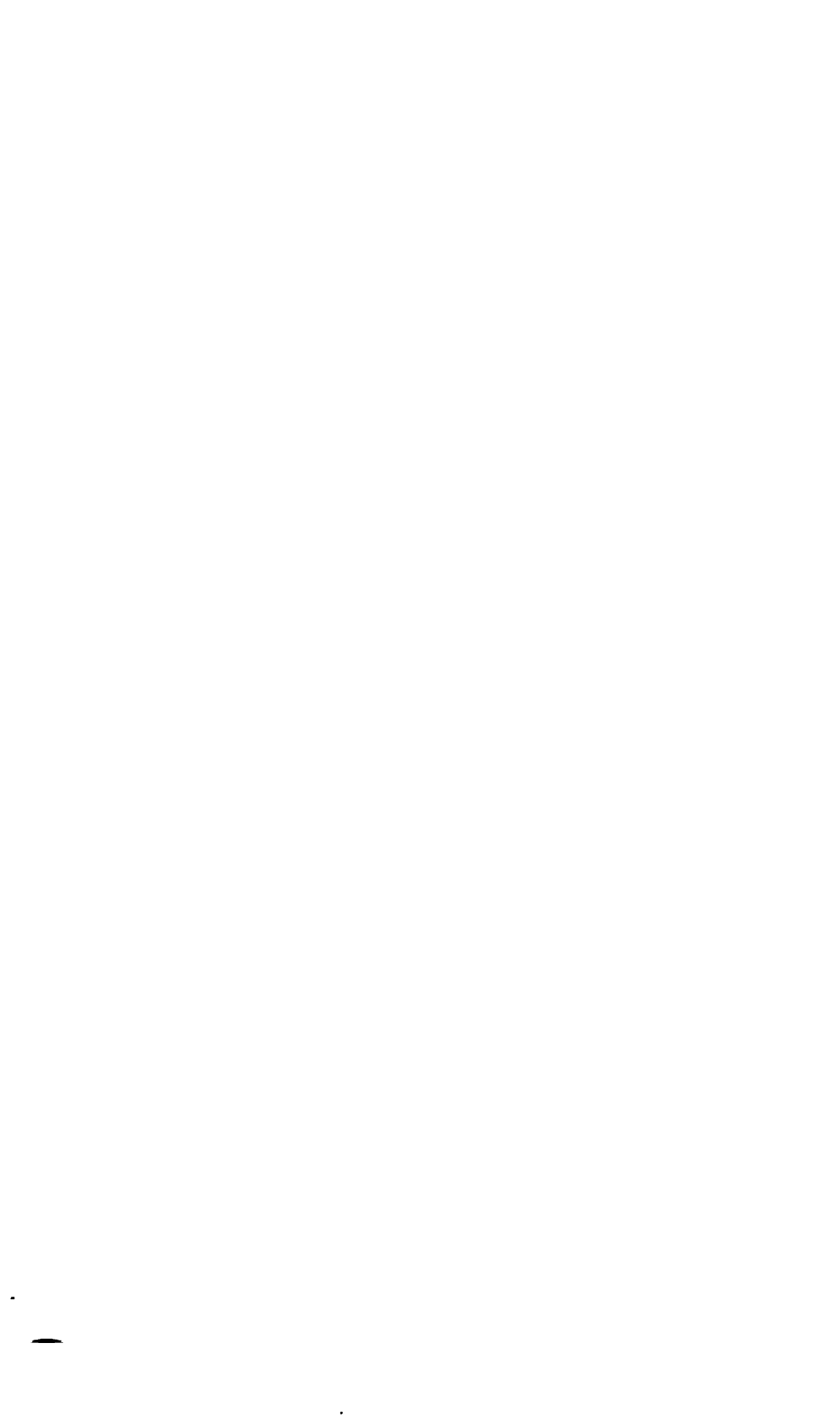












A  
GENERAL ABRIDGMENT  
OF  
**Law and Equity,**

ALPHABETICALLY DIGESTED UNDER  
PROPER TITLES;

WITH NOTES AND REFERENCES  
TO THE WHOLE.

---

BY CHARLES VINER, Esq.

FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY  
OF OXFORD.

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*FAVENTE DEO.*

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## Appendant or Appurtenant.

[ 1 ]

### (C) Destruction of the Appendency.

*In part or in all.*

[1. IF there are two parochial churches, of which one is appendant to the manor of D. and the other in gross, and the patrons and ordinaries are willing to annex and consolidate them into one church, and upon the same union it is agreed that the patrons shall present to the said churches by turns, in this case all the advowson shall be in gross for one turn, and appendant for the other turn to the manor of D. as it was before the union. D. 9 Eliz. 259. 20.]

S. C. cited by Powell J. Ld. Raym. Rep. 198. 200 Pasch. 9 W. 3. in Case of REYNOLDSON v. BLAKE, and he also cited

WINDSOR'S CASE, Cro. E. 688. as authorities in point that an union does not destroy an appendancy, and that since at common law union would not destroy it, much less will union, made by act of parliament, do it, which is an act of the highest law, and designs no wrong to any, but only to take away the incumbency, and to give to each a 2d. turn instead of it, and in the same plight as he had the Advowson before. But Nevil and Treby Ch. J. e contra, and held that the appendancy was destroyed by the union; and as to the Case of D. 259. which is the only Case where quare impedit is brought upon a united church, the words of the book are (Et issint semble en l'autre case per l'opinion d'ascuns) which imply, that others were of a contrary opinion. This point of appendancy is an unnecessary question there, as appears by reading the Case. And as to WINDSOR'S CASE in Cro. E. 688. that was not a church united, nothing of it appears in any of the other Reports of the Case, nor in the Record itself, but it seems to be an imaginary discourse of Croke; but yet there were the words adhuc pertinet, which are wanting in this Case, but there was no necessity there to speak of an union, for he would suppose (which is not at all improbable) that there were two lords of two adjoining manors, who contributed to the building of the church, the one contributed more by one part than the other, and so reserved to himself two turns, and the other lord had the third turn, so that there was no necessity to resort to Croke's imaginations of a union to maintain the declaration in WINDSOR'S CASE; but this supposition is very probable and agreeable to the rules of law, for patronum faciunt dos, ædificatio, fundus.

[2. A man is seised of a manor to which an advowson is appendant, and a stranger brings an assise of darrein presentment, or writ of covenant against him of the advowson, upon which the stranger levies a fine sur consuance de droit tantum to the defendant, and he re-grants that the consuor shall have the next presentment, and he himself the 2d. and so by turns for ever; in this case the advowson remains appendant as before, every other turn, because by this fine it is made disappendant, except every other turn, which does not belong to the grantor. 43 E. 3. 35.]

Fitzh. Quare Impedit, pl. 134. cites S. C. — D. 259. b. pl. 20. cites S. C.

[3. A fold-course, scilicet, common of pasture for three hundred sheep in a certain field, may be appurtenant to a manor, scilicet, that the lord, and all those whose estates he hath &c. have had time out of, &c. common there for three hundred sheep as ap-

Cro. C. 432. pl. 2. Spooner v. Day and Maion S. C. but it

# Appendant or Appurtenant.

goes upon another point. — Jo. 375. pl. 1. S. C. but S. P. does not appear as to the levancy and couchancy. — See tit. Common (L) pl. 7. Sacheverel v. Porter, S. P.

Cro. C. 432. pl. 2. Spooner v. Day, S. C. adjudged and affirmed in error; for be-

[ 2 ] purtenant to the said manor, *without saying levant and couchant upon the said manor.* Mich. 10 Car. B. R. in a writ of error between *Day and Spooner*, per curiam agreed.]

ing but in nature of a common certain it may well be divided or annexed to parcel of the manor, and there cannot be any prejudice to the tenants; for they shall not be charged with more than they were before. — Jo. 375. pl. 1. S. C. and judgment affirmed. — See Common (Q) pl. 3. S. C.

If a man seised of a manor and an advowson appendant, or of a house whereof a shop is parcel, and gives by deed by name of manor and advowson, or house and shop, yet this is no estoppel to say that the advowson is appendant, and the shop parcel of the house. Br. Estoppel, pl. 47. cites 48 E. 3. 4. per Finch. — S. P. and in action after he may demand the manor cum pertinentiis or the house only, and by this he shall recover the advowson and shop; for the gift does not make disappendency or severance. Br. Demand, pl. 2. cites S. C.

[ 5. If a man grants the manor of D. and in the same deed grants the advowson of D. naming it as in gross, yet being appendant before it will pass as appendant. 48. Ed. 3. 4. b.]

[ 6. If a patron presents to an advowson appendant as in gross, this will make it disappendant. 21 Ed. 4. 2.]

[ 7. If a man hath an advowson appendant to a manor, and grants every 2d presentation to another in fee, yet the advowson continues to himself appendant for the other presentation. 43 Ed. 3. 35.]

[ 8. If a man seised of a manor to which an advowson is appendant accepts a fine to a stranger, by which the stranger acknowledges all his right in the advowson to him, this does not make the advowson in gross. 43 E. 3. 35.]

[ 9. But if he had acknowledged his right in the advowson to have been to a stranger, this had made the advowson in gross, and this could not be made appendant after by any grant. 43 E. 3. 35.]

once severed from the manor to which it is appendant, though but for an instant, it becomes in gross, and the appendancy is destroyed for ever; and therefore the difference is, if a man seised of a manor to which an advowson is appendant, accepts a fine of the advowson, and grants and renders every 2d turn; there by the alternate turn the appendancy continues; but if he levies a fine of the advowson, and accepts a grant and render, the appendancy is totally destroyed, because there was an instantaneous severance; per Powell J. Ld. Raym. Rep. 198. Pasch. 9 W. 3.

\* In Ive's Case. — After the death of the lessee it is appendant; adjudged and affirmed in error. Jenk. 310. pl. 91. cites Pasch. 3 Jac. Tuck's Cases

[ 10. If a man be seised of a manor to which an advowson is appendant, and leases the manor without deed for life, reserving the advowson, this makes the advowson in gross, though it be without deed. 20 E. 3. 36. b. \* Co. 5. 11. b. it is in gross during the estate for life.]

11. If a man has *advowson appendant and suffers usurpation, this makes the advowson in gros.* Br. Quare Impedit, pl. 29. cites 43 E. 3. 14. per Belk.

If tenant for life be of a manor, to which an advowson is

appendant, and be in *reversion usurps*, though the advowson be in gros during the life of the tenant for life, it is appendant again after his death; per Holt, Ch. J. Skinn. 662. Mich. 8 W. 3.

If an *infant has a manor to which an advowson is appendant, and suffers a usurpation when the church becomes void, and afterwards at full age grants the manor in fee*, and afterwards the church becomes void, the infant shall present, and not the feoffee of the manor, for the advowson was severed by the usurpation, and yet the infant may present to the same. F. N. B. 34 (X).  
Ibid. (X) in the new notes there (f) cites it accordingly adjudged 16 E. 3. F. Quare Imp. 67. but contra by Danby, 33 H. 6. 13. in the like case. Yet if the *King was so seised, and granted the manor cum advocations*, at the next turn the grantee shall present; per cur. for it was not made disappendant by the King's usurpation.

12. And per Thorp, if a man purchases a manor with the advowson appendant, and suffers usurpation at the first avoidance, he is *without remedy for ever*; for he cannot have Quare Impedit after the six months, and he cannot have writ of right of advowson because he never had possession; quod nota. Br. Quare Impedit, pl. 29. cites 43 E. 3. 14. per Belk.

[ 3 ]

13. If *A. seised in fee of a manor to which an advowson is appendant, makes composition with B. by fine to present by turn*, by this composition the advowson is *appendant every 2d. turn*, because it was never disappendant by this fine but every other turn, which belongs not to the grantor, &c. D. 259. b. pl. 20. cites 43 E. 3. 35. a.

14. Though the advowson may be severed and made in gros, this ought to be *when the owner is seised of the land to which, &c.* but *not by presentment when he is out of possession*; per Danby Ch. J. quod nota good reason, and Needham J. agreed. Br. Presentation, pl. 30. cites 9 E. 4. 38.  
And that where tenant for life alienates the manor in fee, he in reversion cannot present to the advowson before that he has entered into the manor. Br. Presentation, pl. 30. cites 9 E. 4. 38.

15. If *advowson which was appendant be reserved and excepted in the partition of the land*, this makes the advowson in gros notwithstanding it was appendant before. Br. Reservation, pl. 24. cites 2 H. 7. 5.

Br. Partition, pl. 25. cites S. C.  
—Br. Quare Impedit, pl. 118. cites S. C.

16. A. seised of a manor, with advowson appendant, may *give part of the manor to which, &c. with the advowson or villein*, to J. S. and this makes it appendant to this parcel. Br. Incidents, pl. 15. cites 4 H. 7. 10.

17. If things are appendant to a house, yet if the house falls, the things remain appendant to the soil where the house stood. Br. Incidents, pl. 40. cites 16 H. 7. 9.

Br. Bar, pl. 111. cites S. C. & S. P. accordingly.  
—Hob. 39.

40. per Hobart, Ch. J. in case of common of estovers to a house, the right is suspended during the time the house is down; but if he rebuilds his house in the same place, he shall have his estovers again; and Hobart thinks it would be the same if he had pulled down his house, and built it again. But he makes a quære if he brings an assise, or quod permittat, for his estovers, where his house is down, and judgment passes against him, if he shall not be barred finally.

18. A. seised of a manor to which an advowson is appendant, *enfeoffs B. by deed of one acre, parcel thereof, and by the same deed grants*

D. 48 b. pl. 3. S. P. by Shelley; but otherwise it

would be, if the feoffment had been made of the entire manor. *grants the advowson.* The advowson shall pass as in gross; for they are several grants, though but one deed. Arg. 4. Le. 216. 217. pl. 349. in Case of LONG v. HEMINGS, cites 33 H. 8. D. 48.

19. If an advowson be appurtenant to a manor, by the grant of the *manor cum pertinentiis* the advowson passes, but not by the grant of *an acre of land*, parcel of the manor cum pertinentiis; per Williams J. Bulst. 35. Trin. 8 Jac. Anon.

20. In case of a fine levied of the manor, if the advowson be *not specially named, nor cum pertinentiis*, the advowson will not pass. Arg. Bulst. 101. cites 12 E. 1. Fitz. Tit. Grants, pl. 87.

\* And then it passes as appendant. Admitted

[ 4 ]

21. Grant of a *manor habend' una cum advocacione*, will not pass an advowson in gross not named in the premises, unless the advowson be \* *appendant*; per tot. cur. Het. 14. Pasch. 3 Car. C. B. in Case of HARTOP and TUCK v. DALBY, cites 38 H. 6. 36. Abbess of Syon's Case, which was granted by the whole court.

arg. because it is not more beneficial for the grantee one way than the other. Godb. 148. cites it as said by Finchden, 48 E. 3. 14.

Jenk. 310. pl. 91.

22. The king granted the *manor to J. S. for life, excepta advocacione.* This is only a disappendency *pro tempore*; per tot. Cur. Het. 14. Pasch. 3 Car. C. B. Hartop and Tuck v. Dalby.

23. The king granted the *manor and advowson to J. S. to be held by several tenures*, the manor in chivalry, and the advowson in socage; but the justices agreed, that there may be several services, and yet the manor and the advowson not severed. Het. 14. Pasch. 3 Car. C. B. cites the Lord St. John's Case.

24. *Bargain and sale of a manor*, to which an advowson is *appendant*, by indenture not inrolled, does not *pass* the advowson; for it was not intended to pass *as severed*, but as appendant, and as appendant it cannot pass; for the manor does not pass. Jenk. 265. pl. 68.

The advowson by which is become in gross; but when the condition is performed, and the deed avoided, it is appendant again. Arg. Show. Parl. Cases, 218. in S. C.

25. A little thing will make an appendancy. A man seized of a manor, to which an *advowson* is *appendant*, mortgages it in fee with an exception of the *advowson*, and the money is repaid. This is a ground to make it appendant *in reputation*, though it cannot be appendant again *in law*; per Holt Ch. J. Skin. 661. 662. Mich. 8 W. 3. B. R. The King v. the Bishop of Chester.

For more of Appendant (or Appurtenant) in general, see Common Grants (A. a.) (A. a. 2.), House, Incident, Manor, and other proper titles.



# Apportionment.

(A) Of what *Things* there shall be an \* Apportionment.

Fol. 234.

[1. NO apportionment shall be of a *rent-charge*. 32 Aff. 10. tempore E. 1. Avowry 226.]

\*Apportionment signifies a division or partition of a

rent, common &c. or a making it into parts. Co. Litt. 147. b.

Br. Apportionment, pl. 3. cites 7 H. 6. 26. pl. 27. cites 11 H. 6. 22. — Br. Extinguishment, pl. 51. cites 11 H. 6. 27. 22.

The statute of *Quia Emptores terrarum* does not aid *rent-charge*; and before the said statute it was the same of *rent-service* as it now is of *rent-charge*; but by the said statute *rent-service* shall be apportioned, be it by the purchase of the lord, or by any other; for the statute is only for the loss of the chief lord. Br. Apportionment, pl. 28. cites Fitzh. tit. Avowry, 120. 241. — If grantee of a *rent-charge* purchases parcel of the land, all the whole rent shall be extinct. Mo. 93. in pl. 231. says it was agreed in C. B.

[2. No apportionment shall be of a *rent-seck*; for this is not See tit. within the statute which gives an apportionment of rent. 32 Rent (G. a.) Aff. 10.] — Rent for a warren

(which is in nature of a sum in gross) by the grant of the reversion of part, though the lessee attorns, is determined; so that neither the grantor nor grantee shall have any part of it; for a contract shall not be apportioned. Mo. 115. pl. 260. Pasch. 20 Eliz. Anon. — And 26. pl. 59. S. P. and S. C. but cites it as 6 & 7 E. 6. — 3 Le. 1. pl. 1. S. C. accordingly.

[3. *Common appurtenant* to land, for cattle levant and couchant upon the land by grant, shall be apportioned, if part of the land is granted over to another. Mich. 13 Car. B. R. between \* *Sacheverel and Porter*, per curiam, adjudged, upon a special verdict. Intratur Trin. 11 Car. Rot. 324. † *Hobart's Reports*, this Case 296. adjudged; but there it does not appear whether it was by grant or † prescription.]

[ 5 ]

\* Cro. C. 482. pl. 5. S. C. & S. P. resolved. — Jo. 396. S. C. & S. P. resolved. — † Hob. 235. pl. 298. A.

non. adjudged. — Hob. 25. S. P. by Hobart, Ch. J. Arg. said contra. — Noy 30. Cole v. Foxman, S. P. held apportionable, per tot. cur. and seems to be the S. C. as Hob. 235. — S. P. agreed accordingly. 2 Brownl. 297. Hill. 7 Jac. C. B. in Case of *Morse v. Webb*. — Co. Litt. 122 S. P.

† 8 Rep. 78. b. 79. a. Trin. 7 Jac. S. P. resolved accordingly, where the common was appurtenant by prescription. — Mo. 463. pl. 654. Hill. 39 Eliz. Smith v. Bowfal. The Court seemed all of opinion, that if the common, which in that case was by prescription, was appurtenant (as to which point they were divided) that then the common was determined. — But in all the said Cases, except that in Mo. 463. the point is as to alienations made by the commoner, and not of a purchase to be made by him of part of the land in which &c.

*Common of estovers*, as to take reasonable house-wood, hay-wood, &c. and such manner of profits, though they be appendant to the freehold, cannot be parted; for if such an heritage descend to parceners, one shall have the whole profits, and the other sisters an allowance; and the wife for her dower shall have but an allowance only. Fin. Law, 8vo. 158.

4. *Services* shall be apportioned upon disseisin. Br. Cessavit, Sult of Court pl. 27. cites 8 E. 3. is not apportionable; but

if the part of one of the jointenants, who holds by suit, comes to the lord, all the others shall be discharged of the suit. Br. Apportionment, pl. 2. cites 40 E. 3. 40. — S. P. because the lord cannot take the suit, and be contributory to himself of the suit. Br. Apportionment, pl. 17. cit 34 Aff. 15.

5. An *assent* cannot be apportioned. Arg. Le. 120. 132. in Case of COULBOURN v. MIXSTONES; as if the reversion of 3 acres is

is granted, and the tenant for life attorns for one acre, it is good attornment for the whole; for he cannot apportion his assent; cites 18 E. 3. Variance 63.

Br. Contract pl. 30. cites S. C. and Fitzh. Debt. 143. 6. A man retained another to serve for a year for 10*l.* at two feasts, the master died after the first feast, the servant shall not have wages but for the first feast; and if he be retained for one year for 10*l.* and departs before the end of the year, he shall not have any wages; for it cannot be apportioned; because it is not due till the end of the year, because contract cannot be apportioned. Br. Apportionment, pl. 26. cites 27 E. 3. 84.

Br. Apportionment. pl. 7. cites 9 E. 4. 1. S. P. 7. Debt cannot be apportioned. Br. Apportionment, pl. 17. cites 34 Aff. 15.

8. In Scire Facias; if a man leases land rendring rent, and if the rent be arrear by 4 days that he may re-enter, and that the lessee shall render 40*s.* nomine pœnæ for the rent arrear, the lessor re-enter'd into two acres, but not into all, he shall not have the entire pain, but secundum ratam. per Hull; and so it seems that a penalty shall not be apportioned. Br. Apportionment. pl. 15. cites 1 H. 6. 4.

9. Where a man is bound to repair a bridge by reason of his land, and aliens part of it, he shall be rated according to the portion. Br. Apportionment. pl. 21. cites F. N. B. 234. 235.

Br. Obligation, pl. 6. cites S. C. 10. An obligation cannot be apportioned, because it shall be forfeited in all, or saved in all. Nota. Br. Apportionment, pl. 1. cites 20 H. 6. 23.

[ 6 ]

Br. Contract pl. 16. cites S. C. that a contract cannot be apportioned. 11. A contract cannot be severed nor apportioned, therefore on lease of a chamber and boarding of the lessee, rendring rent for the chamber and boarding 6*s.* by the week, if he pleads in debt upon it, quod non dimisit cameram, this goes to all, because a contract is entire, and if it be destroyed in part, it is destroyed in the whole. Br. Apportionment. pl. 7. cites 9 E. 4. 1.

—A contract cannot be divided; admitted by three justices. Cro. E. 851. pl. 8. Hill. 41. Ellis. in the Case of Ardes and Watkins. —The law is, that no contract can be apportioned; per cur. Mo. 116. in pl. 260. Pasch. 20 Eliz. Anon. —The duty arising upon contract personal, is not apportionable. Finch's Law. fol. lib. 2. cap. 13. 45. b.

Finch's Law. fol. lib. 2. cap. 13. 45. b. 12. Upon sale of a thing of his own, and of another thing of another man's for 10*l.* the owner retakes his thing, yet the buyer shall render the entire sum to the vendor. Br. Contract. pl. 16. cites 9 E. 4. 1.

Br. Labourers. pl. 40. cites S. C. — If a man retains a servant for 20*s.* a year, and he discharges him at Easter in the same 13. Debt by a chaplain retained to serve a year for 10 marks; the defendant said that such a day within the year, the plaintiff departed out of his service; and per Chocke J. this debt shall not be apportioned, so that if he does not serve the whole year, he shall not have any thing, because it is not due till he has served; and it is not like where I sell you a horse for 10*l.* there the 10*l.* is due immediately; contra here. Br. Apportionment. pl. 13. cites 10 E. 4. 18.

year to which the servant agreed, he shall not have action for any part of his salary before or after; for nothing is due till the end of the year, quod nota. and the contract is entire and cannot be severed. Br. Labourers, pl. 48. cites 10 H. 6. 2. [but it seems it should be (23) and so are the other editions.] —S. P. accordingly by the best opinion. Br. Apportionment. pl. 22. cites 10. H. 6. 23. —Br. Contract. pl. 31. cites S. C. & S. P.

14. In debt a man seized in right of his wife, sold 400 oaks for 20l. and the vendee took 200 in the life of the feme, the feme died, the baron not being tenant by the curtesy, the heir entered, and the baron brought debt of 10l. for the vendee had paid the other 10l. in the life of the feme; and per tot. cur. because the contract was good at the time of the bargain, and is entire, and cannot be severed, and he has part of the oaks—and might have taken all the 400 in the life of the feme, and did not, therefore his folly, and he shall render the entire sum. Br. Contract. pl. 26. cites 18 E. 4. 5.

Br. Apportionment. pl. 25. cites S. C.—Br. Dette. pl. 165. cites 18 E. 4. 3. C. 21. S. C. But contra if a day of the cutting had been agreed, and he had not cut be-

fore such a day, and the feme died before the day, debt does not lie; for he has not quid pro quo there. Ibid.

15. There was no apportionment of rent at common law by the act of the party, but by act of law. D. 4. b. pl. 4. Trin. 24. H. 8. See tit. Rent.

16. If a man leases land for life or years, rendering rent with clause of re-entry, if the lessor enters into any part of the land, he cannot re-enter for rent arrear after, by reason that condition cannot be apportioned, nor the rent. Br. Condition. pl. 139. cites 33 H. 8. and 9 E. 4. 1. S. P. So if he gives land in tail, and the lessee leases part of the land to the

donor &c. Br. Extinguishment, pl. 49. cites 33 H. 8.

17. By act in law, a condition may be apportioned in the Case of a common person, as if a lease for years be made of two acres, one of the nature of burrough English, the other at the common law, and the lessor having issue two sons dieth, each of them shall enter for the condition broken, and likewise a condition shall be apportioned by the act and wrong of the lessee. Co. Litt. 215. 2. See tit. Condition. (G. d.)—S. P. as by descent. Godb. 3. pl. 3. Pasch. 20 Eliz. C. B. —But in no case at

common law is a condition apportionable by the act of the party so that parcel shall remain, and parcel shall cease; by Periam J. and cites many instances. Mo. 203. pl. 349. Pasch. 27 Eliz. in Knight's Case.

18. A relief can't be apportioned; so that if two coparceners are, and one of them dies, her heir of full age, she shall not pay a relief; for if she should pay any at all, she should pay but a moiety, which she cannot do for the reason above, and that because coparceners are but one tenant to the lord; held per tot. cur. 3 Le. 13. pl. 30. Mich. 8 Eliz. C. B. Anon. [ 7 ]

19. Money payable for tythes by composition, on sale of part of the land shall be apportioned; and per cur. each purchaser shall pay his share, and an auditor was assigned to apportion it. Savil. 4. 5. pl. 12. Pasch. 22 Eliz. Anon.

20. Common appendant may be apportioned, but not common appurtenant. Mo. 463. pl. 654. Hill. 39 Eliz. C. B. Smith v. Bowfall.

Case, is, that unity extinguishes prescription for common appendant, but not common for arable land, &c. But ibid. 462. pl. 651. Hill. 39 Eliz. Bradshaw's

21. A contract by the father with another to board his son for a year, is well apportionable, because it being for tabling which he

S. P. Sid. 225. pl. 19. Mich. 16.

## Apportionment.

Car. 2. B. R. had taken, there ought to be recompence, although he departed Game v. Gunstone, within the year, or that the contractor died within the year; and judgment for the plaintiff. Cro. E. 755. 756. pl. 20. Pasch. 42 Eliz. C. B. Brett v. J. S. and his wife.

abroad to be instructed in needlework for a year, and judgment for the plaintiff, because if there be any variance from the agreement, it is to the defendant's advantage, viz. to pay less than he ought; for the effect is, that he shall pay for her board not exceeding a year; and if she was there for a month, and then had run away or died, the defendant should be charged for it within this assumpsit.—S. C. cited Arg. 3 Mod. 154. in the Case of Plymouth (Countess) v. Throgmorton, as adjudged, because, as the book says, if there be any variance in the agreement it is for the advantage of the defendant; but in the principal Case there, judgment was given for the defendant.

Jo. 375. pl. 1. Day v. Spooner, S. C. and judgment affirmed. 22. Fold-course, appurtenant to a manor, for 300 sheep in 70 acres of land, being in nature of a common certain, may be well divided, or annexed to parcel of the manor; and so a judgment in C. B. affirmed. Cro. C. 432. pl. 2. Hill. 11 Car. B. R. Spooner v. Day.

Sty. 12. S. C. judgment was stayed; for the Court said the law would not supply a casual omission to bring it within the covenant, to ground a breach. 23. An attorney covenanted to allow his clerk 2s. for every quire of paper which he should copy out. In covenant by the clerk, the breach assigned was, That he copied out a bill containing four quire and three sheets, for which 8s. 3d. was due to him, which the defendant had not paid. After verdict and judgment for the plaintiff in C. B. error was brought, and assign'd that there could be no apportionment in this Case, the covenant being to allow 2s. for every quire, and no mention of pro rata; and therefore judgment was reversed. All. 9. Pasch. 23 Car. B. R. Needler v. Guest.

thereupon, whatever the intent of the parties was that were parties to the articles.—S. C. cited Sid. 226. pl. 19. Mich. 16 Car. 2. B. R. and the Court agreed that such declaration was ill, because it did not pursue the agreement.—S. C. cited 3 Mod. 153. Arg. as reversed, because it was an intire covenant, of which no apportionment could be made pro rata.

3 Mod. 153. S. C. in error in B. R. and the Court were of opinion, that this was an intire agreement, and therefore the action not well brought for 3 quarters salary; and for this reason the judgment was reversed, Nisi &c.—This is now altered as to rent by statute of 11 Geo. 2. cap. 19.

[ 8 ] 24. A. appointed C. to receive his rents, and promised to pay him 100l. a year for his service. In three quarters of a year afterwards A. died, during which time C. served him, and demanded 75l. for the three quarters, and had judgment in C. B. by nil dicat. Upon error brought it was argu'd, that without a full year's service nothing could be due, and that it is in nature of a condition precedent; that if rent be reserved yearly, and at the end of three quarters the tenant be evicted, the lessor shall have no rent; for rent shall never be apportion'd in respect of time; and so it is of wages, annuity, and debt; *Annua nec debitum judex non separat*: this being one consideration and one debt cannot be divided. Judgment was reversed. 1 Salk. 65. pl. 1. Hill. 3 Jac. 2. B. R. Plymouth (Countess) v. Throgmorton.

Authority (as of a sheriff to his under-sheriff) 25. A power is apportionable, but a feignory or condition is not; as a warranty, tho' it be destroy'd as to the fee-simple, yet continues annex'd as to the mean estates; per Hale Ch. B. Hard.

Hard. 416. Pasch. 17 Car. 2. in Cam. Scacc. in Case of Edwards v. Slater. riff, not to meddle with executions beyond such

a sum) cannot be so apportioned. Ney 51. in Case of Burchier v. Wiseman.—Hob. 13. S. P. in Case of Norton v. Simms.

26. An agreement was laid to pay 2l. for every tun of iron which should be deliver'd, &c. The declaration was, that he deliver'd &c. one tun and a half. Tho' there was a verdict for the plaintiff, yet it is cited Sid. 225. in pl. 19. as adjudged to be ill. Ibid. in Marg. is cited Yelv. 134. which is the Case of Bettif-  
worth v. Campion, Mich. 6. Jac. B. R. but there the agreement was laid to be to pay secundum ratam of 40s. per tun, and therefore the declaration being so, it was adjudged for the plaintiff that the defendant ought to pay for odd pounds, &c. over and above the tun.

27. A bill of exchange cannot be apportion'd by indorsement. Carth. 466. S. C.—Ld. Raym. Rep. 360. S. C.  
1 Salk. 65. pl. 2. Mich. 10 W. 3. B. R. Hawkins v. Cardee.

28. Where there are two parceners, and one will take advantage of a forfeiture, and the other not, there must be an apportionment. 1 Salk. 186. per Powell J. Trin. 10 W. 3. C. B. in the Case of ESTCOURT v. WEEKES, cites 1 Inst. 355. Kelw. 105.

**F**INDING that gentlemen are in great expectation of the Case of WORTH v. VINER, tried at Guild-hall in December last, and recommended at the same time by Sir John Strange (of counsel against the defendant) to be inserted in his abridgment, I fully intended to have oblig'd those gentlemen with it under this head and this letter of title *Apportionment*; and for that purpose thought it could not be improper to crave his assistance, which I did by a letter to him as follows, viz.

S I R,

**B**EING assured by several gentlemen, as well as news-papers, of the honour you did me publicly at Guild-hall in last December, to recommend my publishing, in my Abridgment, the cause then tried of WORTH v. VINER, I must intreat the favour of your accepting my thanks for it.

But as I cannot do myself that honour of complying with your recommendation, without being supplied with a true report of the Case, I must beg the favour of your supplying me with it, and do assure you I will take care to publish it.

I have likewise this further favour to desire of you, that you will point out to me some Cases, or one single Case at least, out of the year-books, Fitzherbert, or Brooke, or any book of Reports since, down to this time, wherein it has been adjudged that a contract for wages is apportionable; because I perceive some gentlemen have always taken the law to be otherwise, and I would willingly have the point clear'd up to them, which my next volume will give me an opportunity of doing, under the head of title *Apportionment*, and you will thereby highly oblige, SIR,

Inner Temple,  
18 June, 1747.

Your most obedient, &c.

In consequence of which letter, a gentleman, at Sir John's request, [ 9 ] came to me about 10 days after the receipt thereof, to acquaint me that

that Sir *John* had look'd over his papers, but could not find any memorandums to enable him to give me a report of the Case; nor did his memory otherwise serve him for the doing it. Whereupon I told the gentleman, that there was another part of my letter desiring the favour of some one Case as to the point of apportioning contracts for servants wages; but as to that, Sir *John* had sent me no answer. I then mention'd, that I never yet had met with any Case that would support such apportionment, nor could I find any gentleman at the Bar that had, tho' I had ask'd several; that I thought every gentleman ought to do the best he could for his client, so far as was consistent with justice; but he ought to stop there; that any proceeding further, and so procuring injustice to the other side, is utterly unjustifiable; and that, if there was no Case to support such apportionment, the verdict was against law.

As I have not heard from Sir *John* since, I am left to suppose that he has not yet met with his papers, or found any Case to support what he had laid down so earnestly and pressingly to the Jury, that they were guided by him, and not by the Court, who (as I am assured by all the gentlemen that I ever yet heard speak of it) summ'd up the evidence strongly for the defendant.

That the agreement for a year's service was fully proved, both under the hand of the plaintiff, and likewise from his own mouth, positively, and without any salvo, is matter of fact, and undeniable, *viz.* That he had agreed with the defendant for so much a year from the *Midsummer* following. Not a word has been suggested to be then dropt, to qualify or abridge the agreement, whereby it might be construed otherwise than for a year absolutely. But in order to get over this, and to enervate such strong and positive proof, recourse was had by Sir *John* to the private thoughts and imaginations of the living witnesses (and that without suggesting any thing to ground them upon), *viz.* Whether they believed the intention was, that the plaintiff should have no wages if he went away before the year was ended; and this was so much harangued upon, that the jury were supposed to be influenced and inveigled by it.

Upon this question being started to one of the witnesses, I am assured his answer was, That he knew not what to say to it; and that the Court, in summing up the evidence, took notice of that answer, and said, Nor indeed did he know how he should.

There is no considering man but will soon see the consequence of introducing *belief* and *imagination* for evidence, *in opposition to positive proofs*; that it must be very fatal and dangerous, as well to the lives as to the property of mankind, and may well be dreaded, and therefore hope will not be repeated.

If Sir *John* shall please, at any other time, to favour me with a true report of this Case of *WORTH v. VINER*, or of any Case to support it, I shall have other opportunities of inserting it; but should I fail of that honour, I shall endeavour that the Case shall not be lost to the profession and the public.

As Sir *John call'd upon me so publicly to print this Case*, I could not (in justice to myself) say less than I have done.

Many gentlemen construe this as an intended slur upon the *General Abridgment*; but I should rather think, that no gentleman at the Bar would behave with so little decency to so many great men, who have approv'd  
and

and encourag'd the work. And I do hereby most solemnly declare, that I do not know that ever I had done, said, or wrote any thing which might any ways offend him; and for the truth thereof I appeal to the whole world.

For more of this, see tit. *Attaint, Contract, Evidences*, and other proper titles.

## (B) What Act or Thing will make an Apportionment. [ 10 ]

[Or in what Cases there shall be an Apportionment.]  
*Acts of the Parties.*

[1.] If there be *lord and tenant of 20 acres, by fealty and 10s. rent*, and the *tenant aliens 2 acres in fee*, the alienee shall hold the 2 acres pro particula, by the statute of *Quia emptores terrarum*, &c. and the rent shall be apportion'd according to the value. Co.M. C. 503.]

[2. If a man *leases for years freehold, and also copyhold lands*, by the licence of the lord, reserving a rent; and after *grants the reversion of the freehold* land to another, and the lessee attorns, the rent shall be apportion'd; for this waits upon the reversion. Mich. 40, 41 El. B. R. between *Collins and Harding*.] Cro.E. 606.  
pl. 6. Pasch.  
40 Eliz.  
S. C. adjournatur.—  
Ibid. 623.  
623. pl. 15.  
Mich. 40 &

41 Eliz. S. C. After the grant of the reversion of the freehold and attornment, the lessor granted the copyhold to the same person, who brought debt for the whole rent. And Gawdy, Fennor, and Clench held, that the rent issued out of the intire land, copyhold and free; Popham held, that it issued out of the freehold only; but the reversion of both freehold and copyhold being in the plaintiff, it is as one entire reversion, and he shall declare upon the truth of the matter, which he having done, the Court will adjudge upon the whole matter that he has good cause to recover: as in case of a lease of land and goods, rendring rent, and in debt thereupon he declares according to his Case, he may well recover, and so here; wherefore it was adjudged for the plaintiff.—Mo. 544. pl. 723. S. C. and the justices were divided in opinion, whether the rent should be apportioned or not.—13 Rep. 57. S. C. says that the rent shall be divided pro rata portionis; and so it was adjudged.—Godb. 139. pl. 169. 30 Eliz. B.R. *Harding's Case*, [seems to be S. C. notwithstanding the difference of the year] it was holden by the whole Court (as was reported by Sir Robert Hitcham, Knt.) that if a man makes a lease of copyhold and freehold, rendring rent, and the copyhold descends to one, and the freehold to another, that the rent shall be apportioned.

[3. So if the *King's tenant leases for years*, rendring rent, and after *grants the reversion of 2 parts* to another, and dies, and his heir is in ward for the 3d part of the reversion which descended, and the King grants the 3d part over, the grantee shall have an action of debt for the 3d part of the rent; for it shall be apportion'd. Mich. 43, 44 El. B. R. between *West and Lassels*, adjudged.] Cro.E. 851.  
pl. 7. S. C.  
held accordingly,  
because it is a  
contract  
real; for if  
the 3d part  
of a rever-  
sion is grant-

ed of a lease for life or years, and the tenant attorns, the rent is apportionable, and he chargeable to 2 distresses by his own act; and cites 5 E. 3. *Quid Juris clamat*; and so upon the Queen's grant, where attornment is not necessary.

[4. If *lessee for 20 years leases for 10 years*, rendring 34l. 6s. 8d. and after *devises 20s. of this rent to 3 persons, to hold to each of them one third part divided*, and dies, this rent shall be apportion'd Cro.E. 651.  
pl. 8. Ardes  
v. Watkins,  
S. C. Gaw-

dy and Fenner J. held it apportionable, for the reason here given; but Popham and Clench contra, & adjournatur.

—[Ibid. 651. pl. 8. S. C. and then Clench agreeing with Gawdy and Fenner, judgment was entered for the plaintiff with the consent of Popham, in regard the other three agreed. —Mo. 549. pl. 737. S. C. says that Popham agreed that the rent is dividable, and passes without attornment; but that there is no privity for an action; and judgment for the plaintiff.]

apportion'd according to this devise, and each devisee may have an action of debt against the lessee for his part, scilicet, 6s. 8d. tho' thereby the lessee may be charged in several actions; for it seems it might be so divided upon a grant with attornment, and in the devise an attornment is supplied. Mich. 40, 41 El. B. R. between Arge and Watkins, adjudged. Hill. 41 El. B. R. the same Case.]

[11] If lessee surrender parcel of his term to the lessor, there shall be an apportionment; per Dier and Manwood. Mo. 114. pl. 255. Pasch. 20 Eliz. obiter.

[5. If lessee for years of land, rendering rent, accepts a new lease from the lessor, of part of the land, which is a surrender of this part, the rent shall be apportioned; for this comes by the act of the parties. Hill. 43 El. B. R. between Fish and Camption, per curiam.]

[6. If a man leases two messuages in London divisible rendering rent, and after the lessor devises the reversion of one messuage to a stranger, the rent shall be apportioned. Pasch. 1 Jac. B. dubitatur.]

[7. If a man leases three acres for life, or years rendering rent, and after grants the reversion of one acre, the rent shall be apportioned. Hill. 10 Jac. B. Co. Lit. 144. and there cites Pasch. 39. El. Rot. 233. between \*Collins and Harding adjudged, Co. Mag. Charta 504. Where there are judgments cited, P. 39 El. Rot. 233. B. R. between Collins and Harding, Hill. 42 El. B. between †Ewer and Moyle. Trin. 43 El. B. Rot. 243. Contra Hill. 6. 7 E. 6 Bendlows.]

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\* Cro. E. 606. pl. 6. 622. pl. 15. S. C. but S. P. does not appear. —Mo. 544. pl. 723. S. C. but S. P. does not appear. —13 Rep. 57. S. C. but S. P. does not appear. † Cro. 2. 771. pl. 15. S. C. but S. P. does not appear. —S. P. 8 Rep. 79. b. in Wyat Wild's Case. —S. P. by Coke Ch. J. accordingly 2 Brownl. 298. —

\* Cro. E. 851. pl. 7. S. C. but S. P. does not exactly appear, but see supra pl. 4—13 Rep. 58. cites

[8. If tenant by knights service by his last will, devises the reversion of two parts, the devisee shall have two parts of the rent. Co. Lit. 148. cites Trin. 43 El. Rot. 243. between \*West and Lafels, and Hill. 42 E. Rot. 108. B. between †Ewer and Moyle, Co. Magna Charta, 504. contra H. 6 & 7 E. 6. || Bendlows.]

S. C. and S. P. accordingly. † Cro. E. 771. pl. 15. S. C. adjudged for the avowant. —The Case of Ewer and Moyle is in several other books, but not the same point. —S. C. cited 13 Rep. 58. that the avowry is good.

|| S. C. cited and denied. 2 Inst. 504. —S. C. cited and denied 13 Rep. 9. 58. A devise was of an entire reversion and rent, which was void for a third part, because it was burden in capite, and debt was brought for two parts of the rent, and held maintainable. Cro. E. 652. in pl. 8. mentions it as a Case cited as adjudged Pasch. 28 Eliz. Rot. 344. —S. P. and by Anderson J. if the devise is good but for two parts then is the reversion apportioned, and the rent destroyed. Le. 310. in pl. 429. Pasch. 33 Eliz. C. B. obiter. —

[9. If the grantee of 10l. rent out of land grants 5l. thereof to the grantor, this does not extinguish the residue. Trin. 1 Jac. B. between Allen and Payn, dubitatur.]



[10. (So) If the grantee of a rent out of land *releases part of* the rent to the grantor, yet this does not extinguish the residue, but it shall be apportioned. Tr. 1 Jac. B. between *Allen and Pryn.*]

that by the release of part of one entire rent, all is gone, and there can be no apportionment. —But it was said by Drew Arg. what if the *grantee of a rent charge releases parcel of the rent* to the grantor, or his heirs, the residue may be apportioned, and the land shall remain chargeable still for that residue; but if he *releases one acre parcel of the land charged*, then all the rent is gone. Godb. 116. pl. 13. Mich. 39, 40 Eliz. S. P. accordingly, for the grantee dealeth only with that which is his own, viz. the rent, and not with the land, as in case of purchase of part. Co. Lit. 148. and so he says it was holden, Hill. 46 Eliz. in C. B. which he himself heard and observed. —See tit. Rent. (B. a.)

[11. But *otherwise* it is of a common. Trin. 1 Jac. B. said to be adjudged.] Cro. E. 593. 594. pl. 35. Mich. 39 &

40 Eliz. C. B. *Rotheram v. Green*, held by 3 J. contra *Walmley*, that a release in part discharges the whole; for the common is entire through the whole land, and judgment accordingly. —2 And. 89. pl. 53. S. C. held accordingly by three judges, contra one, and judgment accordingly. —*Noy. 67. S. C.* and the Court held the common extinct. —*Goldsb. 114. pl. 6.* it is said, Arg. that if a commoner takes a lease of one acre of the land out of which his common is issuing, his whole common is suspended.

[12. If a man *leases* for life, or years reserving a rent, and after the *lessee surrenders part* of the land to the lessor, the rent shall be apportioned. Co. Lit. 158. Co. Magna Charta. 504.] [12] S. P. contra per cur. obiter. Godb. 95. pl. 107.

Mich. 28 & 29 Eliz. C. B. —*Mo. 93.* in pl. 231. S. P. and that the rent shall be apportioned; cites it as reported to have been agreed in C. B. —*Mo. 114. pl. 255.* Pasch. 20 Eliz. S. P. obiter by *Dyer* and *Manwood*.

[13. So if the *lessor recovers part* of the land in an action of *waste*, the rent shall be apportioned. Co. Lit. 148. Co. Magna Charta 504.] S. P. 13. Rep. 58. in pl. 24. Pasch. 39 Eliz. B. R. accord.

ly. —S. P. accordingly by *Dyer* and *Manwood*. Mo. 114. in pl. 11. Pasch. 20 Eliz.

[14. So if the *lessor enters for a forfeiture into part* of the land, the rent shall be apportioned. Co. Lit. 148.] S. P. per cur. obiter. Godb. 95.

Mich. 28 and 29 Eliz. C. B. in pl. 107. —Co. Lit. 148. b. (k.)

[15. If a *copyholder in fee leases* it for years by indenture, by licence of the lord, and after *surrenders the reversion of one moiety to J. S. who is admitted* accordingly, without any attornment of the lessee, yet J. S. shall have one moiety of the rent, and may distrain and avow for it. *Hobart's Reports 239. between Swinerton and Miller* per Curiam.] Hob. 117. pl. 203. Hill 14 Jac. S. C. —*Brownl.* 178. S. C. and judgment for the avowant.

[16. If a man *leases* for years or life, rendering rent, and after *part of the land is evicted*, or recovered by a stranger by *elder title*, the rent shall be apportioned. D. 35 H. 8. 56. 14.] D. 56 a pl. 15. Trin. 35 H. 8. obiter. —Co. Lit. 148. b.

(p.) —10 Rep. 128. a. S. P. accordingly Mich. 9 Jac. in *Clun's Case*. —

[17. If there are two *jointenants of a term*, and the *one assigns* over his part to the other, it seems that the rent reserved upon this term shall not be apportioned; for the lessees by their own act cannot divide the rent, by which the lessor should be put to several distresses] Roll. Rep. 404. pl. 33. S. C. but S. P. does not appear. —

Co. J. 411. *distresses for his rent. Dubitatur Trin. 14 Jac. B. R. by the bailiff*  
 pl. 11. S. C. *of Ipswich against Martin and Parker.*]

does not fully appear; but it was there held by three justices, that the act of the lessee shall not divide the action of the lessor; so if two lessees make partition, the lessor may have one action against them.—3 Bullst. 211. S. C. but it is reported there, that one of the joint-lessees assigned over to a stranger, and the action of debt was brought against the joint-lessee and the assignee, and the Court was clear of opinion, that the action was well brought, and judgment for the plaintiff.—See *act. Actions* (C. d.) pl. 51. and the notes there.

23 Rep. 65. [18. If a man seised of sixty acres of land, prescribes to have common in other land, for all his cattle levant and couchant thereupon, and he makes a feoffment in fee of five of these acres, his feoffee shall have common proportionably pro rata; for the common is joint and several, and no surcharge or tort is done thereby to the tenant. Mich. 7 Jac. between MORETON and WOOD adjudged, cites Hill. 7 Jac. B. per Coke.]  
 23 Rep. 65. pl. 31. Hill. 7 Jac. C. B. *Mose v. Webb, and Brownl.*  
 180. *Morse v. Well, and a Brownl.*  
 297. *Morse v. Webb*, seem to be S. C. and S. P. seems to be admitted.—Both common appendant and appurtenant shall be apportioned, by division of part of the land, to which the common is appendant or appurtenant. Co. Litt. 122. a.

*Brownl. 180. Morse v. Well*, seems [13] 19. (So) If a man prescribes to have common to two yard lands, for four beasts, four horses, and sixty sheep, scilicet when the land is sowed, to have common after the severance of the corn, and when the land is not sown, to have common all the year; and after he leases for years, one of the yard lands, the lessee shall have common pro rata. Hill. 7 Jac. B. per curiam.]

to be S. C. and judgment per totum for the commoner.—2 Brownl. 197. Hill. 7 Jac. *Morse v. Webb*. S. P. admitted per Cur.—13 Rep. 65. S. C. and it was resolved, that if the same lease had been pleaded, the common during the lease for years is not suspended or discharged; for each of them shall have common ratable, and in such manner, that the land in which, &c. shall not be surcharged; and if so small a parcel be demised, as will not keep an ox or sheep, then the whole common shall remain with the lessor; so as always the land in which, &c. be not surcharged.—S. C. cited by Sir Francis North, Arg. Vent. 386.

20. In assise, per Thorp, if a man leases land for life or in tail, rendering rent, and the lessee or donee leases it to diverse several persons, the several lessees shall not compel the lessor or donor to avow upon them by portions. Quære. Br. Apportionment, pl. 18. cites 22 Ass. 52.

*Brownl. 180. Arg. S. P. accordingly.* 21. If a man purchases part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right. Co. Litt. 122. a.  
 —2 Brownl. 298. S. P. accordingly, by Coke Ch. J.—Mo. 463. pl. 654. Hill. 39 Eliz. *SMITH v. BOWSAL*, S. P. agreed accordingly.—But Mo. 462. pl. 651. Hill. 39 Eliz. *Bradshaw's Case* is contra.—Resolved, that if the commoner purchases parcel of the land in which, &c. yet the common shall be apportioned, because it is of common right. 4 Rep. 37. b. Mich. 26 & 27 Eliz. *Tyringham's Case*.

S. P. Arg. 22. But otherwise of common appurtenant, or of any other common of what nature soever. Co. Litt. 122. a.  
*Brownl. 180. in Case of Morse v. Well*, as to the common appurtenant.—S. P. accordingly by Coke, Ch. J. 2 Brownl. 298.—Resolved, that if he who has common appurtenant purchases parcel of the land in which the common is extinct. 8 Rep. 79. a. Trin. 7 Jac. *Wyat Wyld's Case*.—Mo. 463. pl. 654. Hill. 39 Eliz. in *Case of Smith v. Bowsal*, S. P.—S. P. resolved accordingly, 4 Rep. 38. a. Mich. 26 & 27 Eliz. B. R. *Tyringham's Case*.—One that had common in a great field, wherein several persons were severally seised of several parts, purchased a part thereof to him and his heirs, adjudged that the common was extinct. And. 159. pl. 203. Paich. 28 Eliz. *Kimpton v. Wood*.

**Wood and Bellamy.**—Le. 43. pl. 56. *Kimpton v. Bellamy*, S. C. held clearly that the whole common was gone.—Gouldsb. 53. pl. 4. S. C. & S. P. agreed, and seems to be adjudged accordingly. [But non constat in either And. or Le. or Gouldsb. what common this was.]

23. If a man leases land, whereof he is *seised of parcel by disseisin*, in such case the rent is issuing out of all the land, and by the entry of the disseisee the rent shall be apportioned; because the lease thereof was not void but voidable. Mo. 50. pl. 150. Pasch. 5 Eliz. per Dyer.

24. A. seised of a *warren extending into three vills* in fee made a lease thereof for years by deed, rendring rent, and afterwards by deed granted the *reversion in one of the vills* to B. and the *lessee attorned*; the Court of C. B. held, that neither the grantee or grantor should have any part of the rent; for the law is, that no contract can be apportioned. Mo. 115. pl. 260. Pasch. 26 Eliz. Anon.

And. 25. pl. 59. cites Hill. 6 & 7 E. 6. but seems to be S. C. and held accordingly; but says Quere bene of this

Case, for it seems that the sum reserved is no rent, but due annually to be paid to the lessor, and is merely a debt, though it is mentioned to be paid annually.—3 Le. 8. pl. 1. 6 E. 6. S. C. in the same words with Mo. 115.—Ow. 10. cites S. C. as reported by *Andlows* in 14 H. 7. accordingly.

25. A. leased two closes called *W.* to B. who grants all his estate in one of them to C. and in the other to D.—A. devised all his land called *W.* in the tenure of C. to J. S. who brought debt for rent against B. But the court held that the rent should not be apportioned; because a term is out of the statute. And at another day Anderson Ch. J. said, that if the lessor of two acres grants the reversion of one acre, the whole rent is extinct. Godb. 95. pl. 107. Mich. 28 and 29 Eliz. C. B. *Wiseman v. Wallinger*.

Goldsb. 44. pl. 24. S. C. and Anderson and Rhodes held it not apportionable.

[ 14 ]

—Le. 452. in pl. 339. Arg. cites S. C. as held that all the rent was destroyed.

## (C) By Act of God.

Fol. 236.

[1.] If a man leases land for life or years rendring rent, and after part of the land is surrounded by fresh water, this will [not] make any apportionment of the rent, because the soil remains, and the lessee only shall have the fish in the water, and by ordinary intendment this may be regained again. Contra 35 H. 8. D. 56. \* 14.]

\* It seems that by this is intended that which is printed pl. 15. but I do not observe this very point there. notes there.

See tit. Rent (I. a.) pl. 10. and the

[2. But if a man leases for life or years rendring rent, and part of the land is surrounded with the sea, this will make an apportionment of the rent, for though the soil remains to him, yet the water is part of the sea, and so is common to every man to fish therein as well as the lessee, and by ordinary intendment there is not any possibility of regaining it. Contra 35 H. 8. Dier 56.]

[3. If part of the land in lease be burnt with wildfire, yet this will not make any apportionment, for the land remains notwithstanding, and cannot be so consumed but some benefit may be made thereof. D. 35 H. 8. 56. 14.]

D. 56. a. pl. 15. Trin. 35 H. 8. S. P. obiter. The principal Case

Cafe was of a lease for years of land and a flock of sheep rendring certain rent, and all the sheep died. It seemed to some that the rent was not apportionable though it be the act of God, and no default in either the lessee or lessor, but others were of the contrary opinion; but all thought it equitable and reasonable to apportion the rent.—See tit. Rent. (1. a.) pl. 10. and the notes there.

Br. Apportionment.

pl. 17. cites S. C. but says nothing of the partition, but

only that by the descent of the land to the 2 the rent is extinguished for the moiety, but that in such case he cannot distrain before partition, as it is said arg.—Br. Extinguishment; pl. 31. cites S. C. and awarded by advice of all the justices that the rent was extinct only for the portion; and the other point was said strongly arg.—Co. Litt. 150. a. S. P. that the rent shall be apportioned; and if the grantee infeoffs another of her part of the land, yet the moiety of the rent remains issuing out of her sister's part, because the part of the grantee in the land was, by the descent, discharged of the rent.—S. C. cited Arg. And. 175. in pl. 211.

Br. Extinguishment,

pl. 31. cites S. C.—S. P. Litt. 5. 224.

and Co. Litt. 149. b.—See tit. Rent (W) pl. 1. and the notes there.

[4. If the land in fee descends to two coparceners, of which one had a rent in fee issuing out of the same lands, and after they make partition, the rent shall be apportioned, though all descended to her per mie & per tout before the partition, because this happened by act of law. 34 Aff. 15. adjudged.]

[5. If part of the land out of which a rent-charge issues, descends to the grantee of the rent, this shall be apportioned, because it is by the act of God. 34 Aff. 15. adjudged.]

[6. If land held by rent descends to two coparceners, and after before partition one grants over her part to a stranger, the rent shall be apportioned. 2 E. 2. Avowry 184. adjudged that an avowry upon both shall abate, because there ought to be two avowries upon them.]

[ 15 ]

S. P. and all the debt is extinct; per Skip. to

which Finch. agreed, for debt is intire and cannot be extinguished in part but in toto. Br. Extinguishment, pl. 31. cites S. C.—See Fines (A. b.)

[7. If the consor of a recognizance aliens to several men, and after part of the land descends to the consor, all the land is discharged, because he cannot make contribution, so that an apportionment might be. 34 Aff. 15.]

S. P. per Riche, to which Finch agreed, for the lord can neither do it nor

take contribution. Br. Extinguishment, pl. 31. cites S. C.—Br. Apportionment, pl. 17. cites S. C. & S. P. accordingly.—6 Rep. 2. a. at the bottom, S. P. accordingly. Hill. 36 Eliz. in the Court of Wards in Bruerton's Cafe, cites 34 Aff. 15. and 35 H. 6. Execution 21.—Co. Litt. 149. a. S. P.

[8. If land for which suit is due be in several men's hands, and after part of the land descends to the lord, all the suit is extinct, and there can be no apportionment, because it is intire, and the one should do the suit, and the other should make contribution. 34 Aff. 15.]

9. If donee in tail dies without issue, the donor enters, and the feme of the donee gets dower, or if tenant in fee dies without heir, the lord enters for escheat, the feme of the tenant is endowed, by this the feme shall render the third part of the services, because the extinguishment is the act of God. Br. Apportionment, pl. 17. cites 34 Aff. 15.

S. C. cited All. 27.

10. A lease was made of land and of a flock of sheep, rendring rent, all the sheep died. Several justices and serjeants were of opinion that the rent was apportionable, and many others that

was not, but all thought that it was equitable and reasonable to apportion it. And afterwards the Case was argued in the reading of Moore the Lent following, and it seemed to him, and to Brooke, Hadley, Fortescue, and Brown Justices, that the rent should be apportioned, inasmuch as no default was in the lessee. D. 56. pl. 15. Trin. 35 H. 8. Anon.

## (D) By Act of Law.

[1. IF the king's tenant leases for years, rendring rent, and after grants two parts of the reversion to another, and dies, his heir in ward to the king, and the king grants the ward of the body and land to another, and after rent is arrear, the patentee of the 3d. part of the reversion shall have an action of debt for the 3d. part of the rent, for it shall be apportioned. M. 43, 44. El. B. R. between West and Lassels, per Curiam adjudged.]

Cro. E. 811. pl. 7. S. C. but see (B) pl. 3. and the notes there.

[2. If the lands of a monastery were granted to A. reserving 28l. rent per annum, for the 10th of all the land according to the statute of H. 8. and after A. grants the greater part of the land to B. and after by agreement between A. and B. B. used to pay 20l. of the rent per annum for that which [he] held; and after the grantee is attained, by which his part of the land comes to the king, though all the 10th part was originally chargeable and leviable upon all and every parcel of the land, yet inasmuch as part is (\*) come to the king, it shall be apportioned, and B. shall pay only his 20l. as he paid before. P. 8 Jac. Scaccario, Sir J. Littleton's Case, adjudged.]

Lane 56. S. C. ordered accordingly.

Fol. 137.

[3. If a man, being seised in fee of black acre, and possessed for twenty years of white acre, leases both for ten years, rendring rent, and dies, by which the reversion of one acre comes to his heir, and the other acre to the executor, the rent shall be apportioned, because it happens by act of law. Dubitatur Pasch. 14 Jac. B. R. between Moody and Garnion.]

Mo. 245. pl. 1151. S. C. & S. P. but nothing was said as to

[ 16 ]  
this point  
by the Court.

—Cro. J. 390. ol. 3. Hill. 13 Jac. B. R. Moody v. Germans, S. C. but as to this point no opinion was delivered; sed adjournatur.—3 Bulst. 153, 154. S. C. and the Court agreed clearly upon the apportionment, that by the act of law this may well be, and that there is no doubt of it, but judgment was given upon the absurdity of the words of the condition, viz. (restrain) for (distrain)—Roll. Rep. 330. pl. 37. S. C. adjournatur; and ibid. 367. pl. 20. S. C. but as to this point, whether the condition shall be apportioned the Court did not speak of it, because the verdict found that the lessee was possessed of part of the land for years to come, and of part in fee, and made the lease, and after died seised of the reversion for years, and therefore the Court seemed clearly of opinion that no apportionment can come in question; for it might be that he had surrendered or granted over the severison of the term, and so the condition severed by his own act, and then the condition cannot be apportioned, and for this cause judgment was given clearly against the plaintiff.—See tit. Rent (F. a) pl. 5. S. C.

[4. If a man leases for years, reserving rent, and after one moiety of the reversion is extended upon an elegit, he shall have one moiety of the rent, and it shall be apportioned. Hill. 10 Jac. B. Sir Thomas Campbell's Case, per Curiam resolved.]

See tit. Rent (G. a) pl. 22.

[5. If the husband makes a lease for years, rendring rent, and after his death his wife recovers the 3d part of the reversion for her

*dower, she shall have one third part of the rent, and shall have an action for it. Hill. 10 Jac. B. per Curiam.]*

[6. *So if the feme be endowed of the 3d. part of the rent-service in fee, she shall avow for the 3d. part of the rent, as if the tenant holds by 3 pence, she shall avow for 1 penny. 24 H. 8. Brook Avowry 139.]*

7. *A feme who had a rent-charge married with the tertenant, the baron died, the feme distrained and made avowry, after which she was endowed of the same land, and by the best opinion the rent shall be apportioned. Br. Apportionment, pl. 20. cites 6 E. 2. and Fitzh. Avowry, pl. 206.*

8. *If land descends to one daughter, and the seigniorship of it descends to her and to another daughter, the seigniorship shall be apportioned, and shall not be extinct but for the moiety. Br. Apportionment, pl. 17. cites 34 Aff. 15.*

*Where the lord purchases the land, and the feme of the tenant is endowed after, she shall render no part of the services, because the act of the party. Br. Apportionment, pl. 17. cites 34 Aff. 15.*

10. *So of forejudger in writ of mesne, &c. which are the acts of the party. Br. Apportionment, pl. 17. cites 34 Aff. 15.*

The same of  
a condition  
by the lessee  
in such  
lease. Godb.  
2. pl. 3. 20  
Hill. C. B.

11. *At common law, if A. had made lease of 2 acres, one in borough English, and the other in gavelkind, rendering certain rent, and had issue 2 sons and dies, in this case the rent shall be apportioned. D. 4. b. pl. 5.*

12. *A. has common of pasture sauns nombre in 20 acres of land, and 10 of those acres descend to A. the common sauns nombre is intire and uncertain, and cannot be apportioned, but shall remain; but if it had been a common certain, (as for 10 beasts) in that case the common should be apportioned; and so it is of a common of flowers, of turbary, of pischary, &c. and yet in none of these cases the descent, which is an act in law, shall work any wrong to the tertenant, for he shall have that which belonged to him; for the act in law shall work no wrong. Co. Litt. 149. a.*

[ 17 ]

(E) *How it shall be made.*

See Rent  
(E. a.)  
(E. 2.)

[1. **T**HE Court in an action of debt for all the rent cannot make an apportionment upon demurrer, for it ought to be done by the jury. Hill. 43 Eliz. B. R. between *Fish and Campton*, per curiam.]

S. P. by  
Coke Ch. J.  
Roll Rep.  
368. Pasch.  
14 Jac. in  
Case of  
Moody v.

[2. *But it seems, that a man may bring an action of debt for all the rent, and if the jury see cause of apportionment, yet the plaintiff shall recover so much as he ought to have upon the apportionment. Dubitatur Hill. 43 Eliz. B. R. Pasch. 14 Jac. B. R. per Coke.]*

Garnon.—*If in case where rent reserved upon a lease shall be apportioned, the lessor in an action of debt demands more than he ought, yet upon nil debet he shall recover so much as shall be apportioned and assessed by the jury, and be barred for the residue. 3 Rep. 24. a. per Popham Ch. J.—* Eld. 6. in pl. 1. Arg. cites this opinion of Popham.—*S. P. resolved accordingly. Brownl. 33. Hill. 10 Jac.*

[3. *So upon an avowry, ibidem agreed. Co. M. Charta. 503.*] See tit. Rent (E. a.) pl. 6.

[4. *So if the lord distrains for rent, and the tenant makes refusal, and the lord brings an assise, and the tenant pleads no tort &c. tho' the lord had distrained for 10s. rent, yet if there ought to be an apportionment, and not so much due, the jury shall apportion it. Co. M. Ch. 503.*] 2 Inst. 505. upon the statute of Quia Emptores, &c. cap. 2.—See tit. Rent (E. a) (F. a) (G. a)

[5. *But when a rent is to be apportioned, he who will demand the rent, by force of a condition to avoid the estate, ought to demand the sum directly, to which the rent ought to be apportioned, or otherwise his demand is not good. Pasch. 14 Jac. B. R. per Coke.*] S. C. & S. P. by Coke, Ch. J. Roll. Rep. 368. pl. 20. Pasch. 14 Jac. B. R. in Case of

*Moody v. Garmon.*—S. C. and S. P. by Coke Ch. J. for conditions are odious in the law, and therefore to be taken strictly: and that in such case, the plaintiff ought to be sure, as it were, to hit the bird in the eye, or not to re-enter. 3 Bull. 155.

[6. *But if there be a cause of apportionment of a rent service, and the lord avows, or makes title in an assise, for less rent than is due to him upon the apportionment, he shall not recover more rent than he has made title to have. Co. M. Ch. 504.*] See tit. Rent (E. pl. 2. 3. 6.—Roll. Rep. 386. pl. 20. in the Case

of *Moody v. Garmon*, says, that in that case the plaintiff's demand was of less, than upon the apportionment he ought to have, but that nothing was said to it, whether it was good or not.

7. *Lease was made of land and house for 21 years rendering one entire rent for the whole; afterwards, lessor granted the reversion of the land; lessee attorned. Afterwards the lessor and grantee, with consent of the lessee, made an apportionment of the rent; viz. that the lessor should have so much, and the grantee so much. Dyer and Manwood held the apportionment good. Mo. 114. pl. 255. Pasch. 20 Eliz. Anon.*

## (F) In Equity. In what Cases.

[ 18 ]

1. **MONEY** was covenanted to be laid out on land to be settled to the use of A. for life, remainder to the first, &c. son of the marriage in tail male, remainder to A. in fee; and in the mean time, the money being 10,000l. was to be placed out upon securities, and the interest arising, to be paid to such persons as should be entitled to the rents of the lands, when purchased and settled according to the limitations. There was no issue of the marriage; the 10,000l. was placed out on a mortgage, and the interest payable half yearly. A. died in the broken part of the half year. Lord Macclesfield said (as the reporter says he understood him) that tho' A. died in the broken part of the half year, yet, this interest should not be taken as a rent, but should be apportioned, and a proportion go to A.'s administrators. 2 Wms.'s Rep. 171. 176. Trin. 1723. *Edwards v. Lady Warwick.*

2. By a trust in a marriage settlement, portions for daughters were to be raised, payable at 18, or marriage; and maintenance in the mean time, payable half-yearly at Lady-Day and Mich. until the portions become payable. The eldest daughter attained 18 in August; the question was, if any proportion of the maintenance was to be paid from the Lady-day, to the time in August? And the Master of the Rolls decreed maintenance, to be paid for that time in proportion; and said, that maintenance is always favoured, being for the daily subsistence of children, and not like interest, which is only for delay of payment of what is due; whereas, in this case, the portion is not due till 18. 2 Wms.'s Rep. 501. Mich. 1728. Hay v. Palmer.

3. Upon a petition at the Rolls by Sir Robert Raymond, Ch. J. and Ventris Esq; administrators with the will annexed to the late Lord C. J. Holt, and being also appointed trustees by the Court, to execute the trusts of the said will (the executors and trustees by the said will having renounced their trust) for direction of the Court on this Case, viz. The residue of the testators personal estate was decreed to be laid out in purchase of land, to be settled according to directions in the will; and until proper purchases could be made, the money was to be put out in government or other securities, with the approbation of the Master; and the interest of the money was to be paid to the trustees to be accounted for by them to such persons as should be successively entitled to the rents of the lands, when purchased, according to the will, &c. part of the trust money was invested in South Sea annuities; Mr. J. H. being tenant for life (with remainder to his brother Mr. R. H.) died 25th of January, 1728. The widow and administratrix of J. H. claims an apportionment of the half years dividend or annuity, due and paid the Lady-day next after her husband's death, as interest due to him, at the day of his death; on the other hand, R. H. as next in remainder, insists, that in regard his brother J. H. the tenant for life, died before Lady day, 1729. when the half year's dividend or annuity became due and payable, he, as next in remainder, is entitled to the whole dividend, as he would have been to the whole half year's rent, if the money had been laid out in land. It was ordered, that the said half year's dividend should be apportioned by the trustees, and that so much thereof, as by computation was due to J. H. at the day of his death, should be paid to the administratrix, and the residue to R. H. the next in remainder; for that these annuities are in nature of interest, which tho' payable but half yearly (as interest is often reserved on mortgages, and other securities) yet, where [ 29 ] interest is given for life, it is always computed to the day of the death of the tenant for life, or to the day of paying the principal. But as to another claim by her as administratrix to her husband, as to the growing interest of 6000l. South Sea annuities, which were sold by the trustees 11th August 1727 in order to raise money for a purchase, from the Lady-day next before such sale; the Court was of opinion, that she was not entitled to any allowance, for interest of that sum, though the trustees having purchased



chased the same in the middle of the half year, when three months interest had incurred upon them, and Mr. J. H. had made an allowance for so much interest as was incurred at the time of the purchase, out of his estate for life, and the sums so deducted by the trustees out of the next dividend, were added to the principal trust money; yet the Court would not make her any allowance, for the interest incurred from Lady-day 1727, to August 12th following, when the annuities were sold; because they being sold to make a purchase of land, J. H. the tenant for life, would be entitled to the growing half year's rent at Michaelmas, in lieu of interest, and ought not to have both; per Jekyll, Master of Rolls. M. S. Rep. Hill. 3 Geo. 2. Raymond Ch. J. and Ventris.

## Apprentice.

### (A) Who shall be said to be.

1. *COVENANT* between the master and a third person, the servant not being party, makes no apprenticeship. 2 Salk. 479. pl. 28. Trin. 9 W. 3. B. R. The Case of Chesterfield. 5 Mod. 328. S. C. and S. P.—Comb. 44. Jerrison's Case, S. C. and S. P. admitted.—12 Mod. 132. The King, and Jerrison, and inhabitants of Chesterfield. S. C. and S. P. admitted.—Carth. 400. Chesterfield v. Walton Parish S. C. & S. P. admitted.

2. An apprentice must be by deed, and cannot be discharged but by deed; per tot. Cur. 6 Mod. 182. Trin. 3 Annæ B. R. the Queen v. Daniel. S. P. 378. 5 Mod. 329.

### (B) The Power of the Master.

1. *AN* apprentice to a surgeon, was sent by his master to the East Indies; adjudged that a master cannot send his apprentice beyond sea, except himself goes with him; but he may send him to any part of England. Brownl. 67. Hill. 13 Jac. Coventry v. Windall. But otherwise if it be expressly agreed, or that the nature of his apprenticeship doth import it, as if the master be a merchant, adventurer or sailor. Hob. 134. pl. 180. Coventry v. Woodhall. S. C.

2. If the apprentice, an infant, misbehave himself, the master [ 20 ] may correct him in his service, or complain to a justice of peace, to have

have him punished. Cro. C. 179. pl. 3. Hill; 5 Car. B. R. Gibert v. Fletcher.

3. Information was brought against the master for *immoderate beating* his apprentice by indenture, and held that it lay, and the defendant was convicted. 2 Show. 289. pl. 288. Pasch. 35 Car. 2. B. R. the King v. Keller.

4. If an apprentice in London *marries without his master's consent*, the master cannot turn him away for that reason, but he must sue his covenant. 2 Vern. 293. pl. 443. Hill. 1704, at the end of the Case of Stephenson v. Houlditch.

### (C) Actions, &c. by the Master. In respect of Strangers. And Pleadings.

1. **TRESPASS** *quare N. apprenticum suum cepit*, &c. is good, with [out] counting when he was detained, and how many years he should be apprentice; for he shall not recover the apprentice, but damages; Br. Faux Latin. pl. 38. cites 38 H. 6. 31.

2. *Trespas* of an apprentice taken shall be *quare apprenticum cepit*, and not *servientem*; for then the Court shall abate the writ. Br. Faux. Latin, pl. 38. cites 21 H. 6. 31.

The enticing of an apprentice to depart from his master is not an offence of a public nature, but the party's remedy is by an action on the Case, which he may well maintain.

6 Mod. 182.

Trin. 3 Ann. B. R. the Queen v. Daniel.

3. Action on the Case by A. against B. for *enticing* his apprentice (A being a tradesman in London) *to depart* from his service for 6 days, and diverse times *to take money* out of the box of the shop, and play at cards with B. and that B. *cozened* the apprentice; the Court thought A. might well have action for the departure, and losing the money is a damage to A. and the cozenage is but an aggravation of the offence, and for that the apprentice himself only shall have an action; but in this case, because the damages were intire with respect to the cozenage as well as to the departure, A. could not have judgment by the better opinion of the Court. Noy. 105. Mich. 43 and 44 Eliz. C. B. Valley v. Richmond.

Raym. 200.  
Hambleton  
v. Bere S. C.  
—2 Saund.  
169. S. C.

4. *Case lies for seducing an apprentice from his service*, per quod the master loses his service. Admitted. Lev. 299. Mich. 22 Car. 2. B. R. Hamilton v. Vere.

5. *Indictment for causing an apprentice to absent himself from his master, and keeping and detaining him in that absence*. It was moved to quash it, because not a thing of a public nature, being no other than an action on the Case; but the Court said it was a great offence, and would not quash it; but left the party to demur if he would. 12 Mod. 195. Trin. 10 W. 3. the King v. Kitchner.

6 Mod. 99.  
S. C. and  
judgment

6. An indictment was for *procuring an apprentice to depart unlawfully from his master, and seducing him to take and carry away his master's*

*master's goods.* The defendant was found guilty, and it was moved that this was only a private injury, for which *case lies*, and not in its nature public to maintain an indictment; besides, no fact is laid to be done in pursuance of this inticing, and as to the carrying away the goods no venue is laid where the goods were taken away; and judgment was arrested. 1 Salk. 380. pl. 17. Hill. 2 Ann. B. R. the Queen v. Daniel.

191. pl. 21. S. C. and held naught. — S. C. cited 6 Mod. 289. — 6 Mod. 288. Mich. 3 Annæ B. R. the Queen v. Collingwood, S. P. held accordingly.

7. A common action of trespass will not lie for inticing an apprentice or servant from his master; but if one will take away my apprentice or servant with force, trespass will lie for the master, declaring upon the force, per quod servitium amisit; per tot Cur. 6 Mod. 182, Trin. 3 Annæ B. R. the Queen v. Daniel. [ 21 ]

8. If a man knows that an apprentice ran away from his master, and he keeps and employs him, the proper remedy is to bring an action for so much money paid to the plaintiff's apprentice in wrong of the plaintiff; per the Ch. J. Barnard Rep. in B. R. Pasch. 2 Geo. 2. at the sittings at Guildhall, Aynsworth v. Wood.

## (D) Of suing Bonds for Apprentice's Fidelity, &c.

1. IN debt on apprentice's bond, that if apprentice should embezzle, &c. and if within 20 days after notice given thereof to defendant and one A. and proof to them made, &c. shewing to defendant and A. a confession under hand of the apprentice is not proof sufficient, the apprentice being not fide dignus, and notice and proof ought to be given to them both together, and not to one at one time, and the other at another time. Plaintiff should shew in what place he became apprentice, and that he was such a person as might be apprentice by 5 El. and tho' the statute is not pleaded defendant shall take advantage thereof, because it is a general statute. Cro. E. 723. pl. 55. Mich. 41 and 42 Eliz. C. B. Cardinall v. Heskett.

It is not sufficient to lay that proof was made, but plaintiff must allege precisely in fact that he embezzled so much; for proof is not material unless such a thing was done; and he must also

allege how the proof was made. Cro. J. 488. pl. 8, Trin. 16 Jac. B. R. Lee v. Fyde.

2. Bond was given for the truth and honesty of an apprentice. The master pretended goods were lost, and got the apprentice to sign a note as of particulars of the goods lost and the value of them, but let the note sleep for two or three years without acquainting the obligor with it. An issue was directed on a quantum damnificatus, but the note not to be given in evidence, and afterwards the defendant, the master, being nonsuit upon full evidence, a perpetual injunction was decreed against the bond for all breaches past before the action brought by the master at law. Fin. R. 47. Hill. 25 Car. 2. Trist v. Buckeridge.

3. A. a father, on putting out his son apprentice to B. was bound in a bond of 1000l. penalty for his son's fidelity. The son imbezzles 203l. which A. paid, but desired B. to trust the son no more with cash, or but very sparingly. About a year after the son embezzled about 300l. more, and so it stood for several years, when

Select cases in Chancery in Ld. King's time 4., S. C. decreed by Ld. C. King accordingly.

upon account it appeared he had embezzled 2750l. but of this B. gave no notice to A. till two years after the apprenticeship ended. The Master of the Rolls decreed A. to pay the 1000l. over and above the 203l. before paid, but Ld. C. King decreed the payment of so much as would make it in all 1000l. and the 203l. to be as part of it. 2 Wms.'s Rep. 288. Trin. 1725. Shephard v. Beecher.

## [ 22 ] (E) Chargeable. In what Cases. And How.

S. P. admitted, that an apprentice by the name of an apprentice is not chargeable in account. 11 Rep. 39. b. cites S. C. & S. E. 3. 25 & 7 H. 4. 14 b.

But an apprentice may be charged in account upon collateral receipts, which do not concern the ordinary trade of his master. 3 Le. 63. pl. 92. Hill. 19 Eliz. B. R. Rivers v. Pudsey.

2. *Trespass* upon the Statute of Labourers against a servant for departing within the term, the defendant said, that he was apprentice with him in the mystery of, &c. and he would not teach him the mystery, but beat him so that he could not dwell with him. Judgment, &c. and it was held double, viz. the teaching and the battery, by which he relied upon the teaching. Br. Double, &c. pl. 70. cites 39 E. 3. 22.

3. Where a man is bound that he shall serve for 10 years, and shall not absent himself without special licence of his master, there it is sufficient to say that he served 10 years and did not absent himself without special licence, &c. without shewing the number of licences and the time; for it may be that he licenced him 1000 times, and where a licence is pleaded he ought to shew the place where, &c. Br. Pleadings, pl. 96. cites 6 E. 4. 2.

If master brings covenant for leaving his service at such a time, and defendant justifies by virtue of a licence, at that time the master cannot on that declaration give evidence of a leaving him at another time, for there the time is material, and is not like a transitory matter in trespass; per Holt, Ch. J. 6 Mod. 70. Mich. 2 Anne B. R. Anon.

By the custom of London an infant above the age of 12 years may bind himself apprentice, but the Court said that notwithstanding this custom a collateral covenant shall not bind him, Cro. B. 652, 653. pl. 12. Hill. 41 Eliz. B. R. Walker v. Nicholson.

4. An infant of 16 years bound himself apprentice in London, and after went away with some of his master's money. In the indenture are these words, That the apprentice shall be loyal & secreta sua velaret & similia, without other words of covenant expressed. In covenant against him the Court held, that those words imply covenant, and seemed of opinion, that by the custom of London the action lay against him, Mo. 135. pl. 280. Trin. 25 Eliz. Stanton's Case.

In an action of covenant upon an infant's indenture of apprenticeship, the plaintiff set forth the custom of London, that one above 14, and under 21, unmarried, may bind himself apprentice, and that the master thereupon shall have tale remedium against him as if he were 21, and alleged that defendant went from his service per quod, &c. The Court held, that by the words (tale remedium) an action of covenant lies against him as against a man of full age; and tho' by common law or the statute his covenant shall not bind him, yet by the custom it shall. Mod. 271. pl. 22. Trin. 29 Car. 2. B. R. Horn v. Chandler.—Admitted that covenant lies. 2 Vern. 493. pl. 445. Hill. 1704. at the request of the Case of Stephenson v. Houlditch.

5. Debt was brought on a bond entered into by an apprentice to deliver up a true and just account of all wares delivered to him to trade withal. It was objected, that this was void by the statute of 5 Eliz. [cap. 4.] But per tot. cur. clearly, all such contracts are out of this statute, that being only to make contracts void for the having an apprentice, whereas this is only for the making a just account, which is a collateral thing; and judgment for the plaintiff. 3 Bulst. 179. Pasch. 14 Jac. Bennet v. Belfield.

6. In action of covenant brought against an infant-apprentice, for departing from his service without licence, it was held that he is not bound by any covenant or obligation of his, either at common law, or by the statute of 5 El. Cro. C. 179. pl. 3. Hill. 5 Car. B. R. Gilbert v. Fletcher.

7. One bound apprentice to a taylor in Oxford, marries at the end of 2 years, and after served out the rest of his time. Covenant will lie against him; but it is no loss of his freedom, and a mandamus will lie to make him free. Lev. 91. Hill. 14 & 15 Car. 2. B. R. Townsend's Case. [ 23 ]

Sid. 107. pl. 20. Towns- end v. the Mayor of Oxford, 2.

C. but the point of covenant does not appear. — Raym. 69. S. C. but S. P. does not appear; but ibid. 92. S. C. & S. P. admitted.

8. Debt upon bond, for the faithful service of an apprentice, conditioned amongst other things, *That the apprentice should give an account of his master's wares, &c. upon reasonable demand.* The defendant pleaded performance. The plaintiff replied, that such goods came to the hands of the apprentice at H. and that he was required to give an account thereof, but refused. Exception was taken to the replication, that it was not said who required the apprentice to account, nor to whom; and likewise that it was adjunc & ibidem recusavit, but not adhuc recusat; and held to be ill. Lutw. 386. 389. Hill. 1 & 2 Jac. 2. C. B. Elwes v. Vaughan.

9. An apprentice was turned over to A. according to the custom of the city of London, before the chamberlain, &c. The assignee cannot maintain covenant on the indenture of apprenticeship; for he is no party to the deed, and custom cannot make an assignee, Show 4. Pasch. 1 W. & M. Barker v. Beardwell.

10. Covenant lies not against an apprentice, being an infant. 7 Mod. 15. Pasch. 1 Ann. B. R. Lilly's Case.

11. A waterman's widow took an apprentice, who went to sea [\*being pressed into the Queen's service] and earned 2 tickets, which came to the defendant's hands. She brought trover for the tickets, and had judgment; for *whatever an apprentice gains belongs to the master*, and he may have action for it. 1 Salk. 68. pl. 8. Trin. 2 Ann. B. R. Barber v. Dennis.

And if he be apprentice only, de facto is sufficient.

\* 6 Mod. 69 S. C. & S. P. agreed if he were a

legal apprentice; and it being objected, that he was not a legal apprentice, Holt, Ch. J. said he would understand him an apprentice de facto, and that is sufficient against the defendants being wrong doers.

12. An apprentice's embezzling or making use of his master's cash, will be a forfeiture of his indentures; for he has only the custody of his master's goods; per cur. 10 Mod. 144. Hill. 11 Ann. B. R.

quashed; but the Court refused it, and said it was a good order, it being hard a master should keep one who could do him no service, and the parish in the mean time go free. Skin. 114. Trin. 35 Car. 2. B. R. Anon.

Carth. 198.

199. The King v. Gately, seems to be S. C. and the Court held the order,

not being under the seals of the justices, which is expressly required by the statute, to be a material defect, and therefore it was quashed.

Exception was taken to an order for *discharging* an apprentice, that it was not under the hands and seals of 4 justices, as the statute directs. Sed non allocatur; for it sufficeth that it is said in the record, that the order was under their hands and seals, the order itself being delivered to the master for his indemnity. Cumb. 344. Mich. 7 W. 3. B. R. Gately v. Green.

An order of justices for *discharging* an apprentice upon the statute of 5 Eliz. was quashed, it being not signed by them, as the statute requires. And it was said, that one piece of wax might be the several seal of several people, putting their seals severally to it. 7 Mod. 55. Mich. 1 Ann. B. R. The Queen v. Harris.

[ 26 ] 7. By the custom of London a master may justify turning away his apprentice for *frequenting gaming*, and may justify it before the chamberlain; per Cur. 2 Vern. 291. pl. 281. Trin. 1693. Woodroffe v. Farnham.

S. P. accordingly, Carth. 203. Pasch. 5 W. & M. in B. R. The King v. Cherry.

198. Mich.

3 W. & M. in B. R. The King v. Gately. — S. P. dubitatur by Twissden & Rainsford, & adjourned. Mod. 287. pl. 33. Trin. 29 Car. 2. in B. R. Watkins v. Edwards. — 12 Mod. 349. Pasch. 12 W. 3. the King v. Hays, S. P. and Holt Ch. J. held strongly that it was not good. — 1 Salk. 68. pl. 6. Trin. 13 W. 3. B. R. the King v. Johnson, S. P. and Holt Ch. J. delivered the resolution of the Court, that the order was good; but said, that if it had been a new question, he should have held a prior application to some justice out of sessions necessary, but after so many orders affirmed in this Court to the contrary, it is too late to unsettle that now. — 12 Mod. 553. S. C. and the King v. Fenwick, S. P. by Holt Ch. J. accordingly. — S. C. cited 12 Mod. 350. says it was unanimously resolved to be good; and Holt said, he was brought to that resolution rather from the necessity of the thing, the practice being all so, than any reason he saw for it. — S. P. by Holt Ch. J. and the order was confirmed. 12 Mod. 499. Pasch. 13 W. 3. the King v. Dillon. — 2 Salk. 491. pl. 56. the King v. Johnson, S. C. & S. P. accordingly.

The stat. 5

Eliz. leaves

this to their

discretion,

per Keeling

Ch. J. Mod.

2 pl. 6. Mich.

21 Car. 2. B. R. Anon

— S. P. Skin.

108. Duhamel's Case;

and there Saunders

Ch. J. cited a case

where part of the money

was returned though the

*discharge was through the ap-*

*prentice's own default*

— 2 Show. 289. pl. 289.

the King v. Duhamel.

Pasch. 35. Car. 2. B.

R. the S. C. the sessions

on complaint of immoderate

beating, and not providing

necessary meat and

drink for the apprentice,

made an order for his

discharge and returning

the money he had with him,

and for his delivering up his

9. Sessions may order money to be returned to the apprentice; per Eyres J. but Holt Ch. J. contra; for the statute relates only to apprentices in husbandry, and such like. Cumb. 204. Pasch.

5 W. & M. in B. R. The King v. Cherry.

Ch. J. Mod. 2 pl. 6. Mich. 21 Car. 2. B. R. Anon — S. P. Skin. 108. Duhamel's Case; and there Saunders Ch. J. cited a case where part of the money was returned though the *discharge was through the apprentice's own default* — 2 Show. 289. pl. 289. the King v. Duhamel. Pasch. 35. Car. 2. B.

R. the S. C. the sessions on complaint of immoderate beating, and not providing necessary meat and drink for the apprentice, made an order for his discharge and returning the money he had with him, and for his delivering up his indentures and wearing apparel, and it was resolved that they had power to discharge him by the stat. 43 Eliz. though not bound out by the parish; and also that they had power to order the returning the money as an incident inseparable to the other, and confirmed the order. —

12 Mod. 553. Trin. 13 W. 3. S. P. as to the restoring the money, and Holt Ch. J. said the order was very good as to that point; for the words of the statute are, That they shall do what in equity they shall think proper, and the order was affirmed per Cur. the King v. Johnson, and the King v. Fenwick. —

1 Salk. 67. pl. 3. Hill. 11 W. 3. B. R. Dillon's Case. S. P. held accordingly. — 3 Salk. 490. pl. 9. said to have been so adjudged. — Sessions ordered an administrator to refund the money the intestate had received with the apprentice; the whole Court seemed strongly of opinion that this was not good; for how can the justices examine the matter of assets? and their order is not like a judgment which an

executor

executors can plead, and which is always *de bonis testatoris*, but in this case they must attach the party himself. 11 Mod. 110. Pasch. 6 Anne B. R. the Queen v. Standish.

10. Order by justices, that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband. Upon motion the order was quashed; for the *justices cannot turn over an apprentice*; though he applied to them that cannot give them a jurisdiction. Cumb. 324. Pasch. 7 W. 3 B. R. The King v. Chaplain.

Ibid. 339. Trin. 7 W. 3. B. R. William's Case, S. P. Holt doubted of such order, and said it was fit to be considered.

11. Power to discharge apprentice extends only to such trades as are *specifically named* in the statute. 2 Salk. 471. pl. 4. Mich. 7. W. 3. The King v. Gately.

Extends not to discharge surgeons' apprentices. Cumb. 353. accordingly.

354. Hill. 8 W. 3. B. R. S. C. — 5 Mod. 339. S. C. & S. P.

12. It seems reasonable, if a master, who is bound to keep an apprentice, turns him out, whereby he is *likely to become chargeable* to the parish, upon complaint of the church-wardens the justice may order the master to take him again; and it seems that the remedy must be by way of indictment; per Holt Ch. J. Cumb. 405. Hill. 9 W. 3. B. R. Anon.

13. Justices at sessions are proper judges, whether fit to *oblige H. to take apprentice* or not. 2 Salk. 491. pl. 27. Trin. 13. W. 3. B. R. Minchamp's Case.

Justices may compel a man to take

apprentice against his will, or at least in husbandry. Show. 76. Mich. 1 W. & M. The King v. Fairfax. — 2 Show. 191. The King v. Clerk. But the latter resolutions are, that he is compellable. Ibid. — Per 3 justices against Holt Ch. J. They may impose an apprentice in husbandry, but not on a tradesman. Carth. 94. S. C. — 3 Mod. 269. S. C.

14. If a master *licences* his apprentice to leave him, he cannot afterwards recal that licence; per Holt Ch. J. 6 Mod. 70. Mich. 2 Ann. Anon.

15. Per Cur. since we allow the justices power to put out apprentices, we must allow an *\*indictment* for disobedience, either in case of *not receiving, turning off, or not providing for* such apprentice as the law requires. 1 Salk. 381. pl. 29. Pasch. 3 Ann. B. R. The Queen v. Gould.

16. An order was made at the quarter-sessions under the hands and seals of 4 justices to discharge an apprentice; for that it appeared to them, upon the oaths of physicians and surgeons, that *he had the king's evil to such a degree as rendered him incapable of serving*, the order was quashed per tot. Cur. First, because it was *not said that any of the justices was of the quorum*, which the statute 5 El. cap. 4. s. 25. expressly requires. Secondly, because the justices have not power to discharge for any such cause. MS. Cases, Trin. 4 Geo. B. R. The King v. the Inhabitants of Hales Owen, Com. Shrop.

17. An apprentice bound in London before the chamberlain to a *freeman who is a glazier*, which is no trade within the 5 Eliz. cap.

## Apprentice.

It may be discharged by the justices if he serves his master out of London, notwithstanding paragraph 40 of that statute expressly saves the liberties and privileges of the city of London as to having and retaining of apprentices, and it is declared that that statute shall not be prejudicial to them; for per Cur. the apprentice being out of London, and serving his master out of the city, there can be no proceedings against him before the Chamberlain. 2 Ld. Raym. Rep. 1410. Mich. 12 Geo. the King v. Collingbourn.

See (E) pl.  
4. 9. (H)  
pl. 7.

### (I) Custom of London.

1. IN action of covenant on an apprenticeship, defendant pleaded a *bye-law* in London, where he was apprentice, by the common council there, that, if any freeman took the son of an alien apprentice, the covenants and bonds should be void, and adjudged no plea, for they cannot make the covenants and bonds void, but may fine or punish such master. Mo. 411. pl. 562. Trin. 37 Eliz. Doggerel v. Pokes.

But upon a  
covenant to  
serve as an  
apprentice an  
action lies,  
but then the

2. By the custom of London, an infant above the age of 12 years, may bind himself apprentice. Cro. E. 653. pl. 12. Hill. 41 Eliz. B. R.

but then the custom of London must be

See Keb. 376. 512. Mould v. Wallis.

3. By the custom of London, executors shall place testator's apprentice to another master of the same trade; by Holt Ch. J. 1 Salk. 66. pl. 1. Mich. 10 W. 3. B. R. in the Case of the King v. Peck.

[ 28 ]

4. A waterman's apprentice, is not within the custom of London, to bind himself being under 21. Arg. and agreed by all 6 Mod. 69. Mich. 2 Ann. B. R. in the Case of Barber v. Dennis.

5. Other cities than London, have no such custom to make infants apprentices, to assign apprentices, and that after such apprenticeship they are free; per Holt. 1 Salk. 204. pl. 2. Pasch. 4 Ann. in Case of the Mayor, &c. of Winton v. Wilkes.

### (K) Settlement by Apprenticeship. Where.

1 Mod. 328.  
S. C. accordingly.—  
Comb. 445.  
Jerrison's  
Case, S. C.  
accordingly.  
—Carth.  
400. Che-  
sterfield v. Walton, S. C. accordingly.—12 Mod. 132. the King and Jerrison and Inhabitants of  
Chesterfield, S. C. accordingly.—Skin. 671. S. C.

1. A. Puts B. apprentice to C. but B. is no party to the deed; B. continued a year with C. adjudged that this makes no settlement in the parish C. is of; because 'twas no service, and B. was no more than a boarder there for his education, which is no service to make a settlement. 2 Salk. 479. pl. 28. Trin. 9 W. 3. B. R. the Case of Chesterfield.

Poor's Set-  
tlements 70.  
pl. 92. S. C.

2. Misserden sent J. H. his wife and children to Painswick, and the sessions on the appeal discharged the order; then the same persons



sons were sent by another order to Brimsfield, as the place of their birth; Brimsfield appealed, and then the sessions order recited the whole matter of fact; which was, that *J. H. was an apprentice by deed, to one J. S. a butcher, and there was a parol agreement to live one fortnight at his father's house, and another fortnight at his master's.* The order took notice, that he did not live 40 days at one time in one place, but concluded that he was settled at Painswick, different to the former sessions order. It was moved to quash the sessions order, it being founded on an erroneous notion, and the conclusion will not warrant the premisses; for the statute says, there must be an inhabitancy as well as an apprenticeship for 40 days at least; the Court was of opinion to quash the sessions order, and a rule to shew cause the first day of the next term. Poor's Settlements 63. pl. 85. Pasch. 11 W. 3. The Parish of Miserden v. Painswick.

says, that a covenant was between the master and apprentice that one quarter of the year he should live with his father, and the other with his master, but did not live 40 days at a time. It was objected, that a parol agreement cannot avoid a deed

it being no defeasance, and here is no fraud alleged to evade a settlement; per Cur. it is said he never served 40 days at a time. Pratt Ch. J. said, though a parol agreement cannot discharge the deed, yet it is sufficient evidence to prove a fraud, but not living 40 days at a time was held no settlement.

3. Apprentice in law is not assignable; but if under the assignment he serves his time in another town, he gains settlement there. 12 Mod. 553. Trin. 13 W. 3. the K. v. Inhabitants of Aicles.

4. A poor child being bound apprentice at A. was assigned over to another master that lived in B. Held he should gain a settlement at B. where his second master lived. 1 Salk. 68. pl. 7. Mich. 13 W. 3. B. R. Castor v. Aicles Parish.

Id. Raym. 683. S. C. by name of Caistor v. Eccles (parish).

5. The son was bound an apprentice to his father, and the father gave up his indenture to the son, and bound him out to a service into another parish for a year, where he served, but did not cancel the indenture, and becoming poor the justices ordered him last legally settled in the parish where the father lived, because the indenture being still in force, his apprenticeship continued; per Cur. the indenture not being cancelled, the obligation of the apprentice continues; and if the father should get the indenture into his hands again uncanceled, and sue the son thereupon, the aforesaid agreement would not be a good plea for the son. 6 Mod. 190, 191. Trin. 3 Annæ in B. R. Thursley Parish's Case.

[ 29 ]

6. Apprentice may gain a settlement by serving a lodger, though the master has no settlement there. 2 Salk. 553. pl. 21. Hill. 4 Ann. B. R. Parish of St. Bride's v. St. Saviour's.

7. B. was bound apprentice for 4 years to J. S. and lived out these 4 years at St. Bride's with him; J. S. was only a lodger, and had no settlement there, and the Court held the apprentice was well settled at St. Bride's; for he was not a person removeable, nor does his settlement depend on his master, as that of a wife on her husband for a settlement, but he gains a settlement for himself within 14 Car. 2. by 40 days inhabitation; and so of a hired servant. 2 Salk. 533. Hill. 4 Ann. B. R. St. Bride's Parish v. St. Saviour's Parish.

Dalt. Just. 246. cap 73. cites S. C. — S. C. cited, per Powis, J. 11 Mod. 205. Hill. 7 Ann. B. R. in Case of the Parish of St. Giles in the Fields v.

Weybridge, by name of St. Bride's v. the Savoy; and says, because the service was performed in the parish of St. Bride's, it gained the servant a legal settlement.

Shew's Pa-  
rish. Law  
224. times S.  
C.—S. P.  
Just. Case  
Law, 227.—  
Barely bind-  
ing a man  
apprentice

Where a person is bound apprentice by indenture, whenever this apprentice continues 40 days in the service of his master or mistress; there such apprentice gains a settlement; and where any person serves the last 40 days of his apprenticeship, that is the place of his last legal settlement; and so it is likewise of an hired servant. Poor's Settlements 58. cites Hill. 4 Ann. B. R. Anon.

Does not gain a settlement, unless he serves 40 days. 11 Mod. 206. Hill. 7 Ann. B. R. per Holt Ch. J. in the Parish of St. Alban's v. the Parish of St. Botolph's Bishopsgate.——MS. Cases, Trin. 9. Ann. B. R. the S. P. For the act says, that such binding and service shall make a settlement.

9. A. removed by certificate from B. to C. takes an apprentice, who serves out his time at C. and lives 2 years, cannot be removed with his master. 11 Mod. 204. Hill. 7 Ann. B. R. St. Giles v. Weybridge Parish.

10. A gardener took an apprentice, but having no work for him made an agreement with a man who lived in another parish, that his apprentice should work with him for wages, which he accordingly did, and the master had the wages. Powis J. was of opinion at Dorchester assizes Lent 1709, that this apprentice did not gain a settlement by this service in the parish where he worked, this matter coming in question before him upon a case stated. MS. Cases.

S. P. held accordingly, and that it is not necessary that the binding and service should be in one and the same parish.

10 Mod.

279 Hill. 1 Geo. 1. B. R. the King v. the Inhabitants of Bury-Pomroi.——Poor's Settlements 65. pl. 87. S. C. by name of Stoke Clemyng v. Bury-Pomroi, says the Court inclined he had gained a settlement at B. but adjournatur.

12. If an apprentice be bound to one who has no right to take an apprentice, yet the apprentice will gain a settlement under such an indenture by his service. MS. Cases Trin. 9 Ann. B. R.

[ 30 ] 14. 12 Ann. st. 1. cap. 18. s. 2. enacts, that if any person shall be an apprentice bound by indenture, is a hired servant to any person who did come into any parish by certificate, and not afterwards having gained a settlement, such apprentice by such apprenticeship, and such servant by serving as aforesaid, shall not gain any settlement.

But where an apprentice served his last year of his

apprenticeship with his master in another parish to which his master removed, and the master having no certificate, this was a settlement of the apprentice in the last parish: for the above statute relates only to certificate-masters. 10 Mod. 279. B. R. Hill. 1 Geo. 1. the King v. Bury-Pomroi Parish.

A certificate man with his apprentice went to S. where the man purchased a house of the value of 60l. and there the apprentice served the last 6 months of his time, he married and died, his wife is settled at S. because his master by his purchase gained a settlement, though he came with the certificate; and this is the settlement of the apprentice, he having served the last 40 days of his time there. MS. Cases, Hill. 6 Geo.

A. worked several years in the parish of St. John, and was afterwards bound apprentice to one living there, but always lay in the parish of St. James, and had his meat, drink, and lodging there, except in fair-time, by agreement, and the Court held he gained a settlement in St. John's parish by the apprenticeship. 8 Mod. 285. Trin. 10 Geo. the King v. the Parishioners of St. John, &c.

father.

*father in a third*, and it was held per Cur. that he gained no settlement as an apprentice. Poor's Settlements, 80. pl. 106. Pasch. 1717. the Parish of St. Olave Jury's Case.

16. One G. was an apprentice to *J. S. a seafaring man*; who lived in the parish of St. Olave's Jury; the apprentice *lived with his master 3 months, but always on ship-board out of the parish*. Prat J. said, it does not appear that he was sent by his master to *watch on ship-board*, if it had, it had been carrying on his master's business, and continuing in his service, and doing his duty. The Court adjudged he was not settled in the parish; for there must not ~~only~~ be an apprenticeship, but a residency, and a man is deemed to be resident where he lodges. Poor's Settlements, 79. pl. 105. Parish of St. Mary's Cole Church v. the Hamlet of Radcliffe.

17. One born in A. is put an apprentice in B. where he served two years, and then his *master died*, when he went ~~back~~ to A. and married, had children, and died; the wife and children shall be sent back to B. 8. Mod. 169. Trin. 9 Geo. 1. St. Giles in Reading v. Everley Black Water.

18. Where one is bound apprentice by *indenture*, it cannot be *discharged* but by deed or by the sessions, and a *hiring* after he is bound, or any consequences arising upon such hiring, are entirely void whilst the indenture subsists, and till it is defeasanced; for when an apprentice serves 40 days, by virtue of the indenture he cannot gain *another settlement*, though his *master consents*, because he had a settlement by the service under the indenture. Admitted per Cur. 8 Mod. 236. Pasch. 10 Geo. Buckingham Parish v. Sevington.

19. One J. W. was bound apprentice to J. P. of St John's parish in the Devizes, hosier. The said J. P. having a small house, *the father was to find meat, drink, washing and lodging, the master allowing 2s. 6d. per week; the apprentice never lodged with his master in St. John's parish, but with his father in Bishop Cannings*. Held that the apprentice gained no settlement in St. John's Parish by virtue of the apprenticeship with his master, in regard he never lodged in the parish for the space of 40 days. Poor's Settlements, 118. pl. 159. Trin. 1724. B. R. the Chapelry of St. James in the Parish of Bishop Cannings v. Inhabitants of Devizes in the County of Wilts.

S. P. For binding an apprentice and serving will not make a settlement, but *the settlement must be by Inhabiting*, which cannot be but where the party lodge; per Fortescue & Ray-

mond J. 2 Ld. Raym. Rep. 1731 S. C. by name of the Inhabitants of St. John Baptist in Devizes v. the Inhabitants of Bishop Cannings.

20. A. bound apprentice to a butcher in Cirencester *lived with his father for the first 6 years, and then came and lived with his master up and down for three quarters of a year*. It was objected, that it did not appear that he lived 40 days with his master; per Cur. it is set forth that he was up and down three quarters of a year with his master, so room to intend he was resident 40 days. Poor's Settlements 118. pl. 159. Trin. 1724. B. R. in Case of the Chapelry of St. James in the Parish of Bishop Cannings v. Inhabitants of St. John's in the Devizes in the County of Wilts, cites the King v. Cirencester (Inhabitants).

[ 31 ]  
Shaw's Parish Law.  
158. cap. 35.  
f. 29. S. C.

8 Mod. 168. S. C. It was objected, that the apprentice was not turned over by writing to the master who dwelt in

21. A. was bound apprentice to B. who lived in St. Olave's, afterwards A. *by his master's consent, lived with another person in Allhallows*, and per Cur. he gained a settlement in the last place; for a person may serve his master in another place or parish, and although he serves another man, yet it is by consent of his master, and the benefit accrues to the master. Poor's Settlements, 114. pl. 153. the Parish of St. Olave's Southwark v. Allhallows.

Allhallows'; and if so, then he could not gain a settlement there upon account of his apprenticeship, because it cannot be said that he served in that parish as an apprentice. But per Cur. this very point was determined in Mich. 3 Geo. between the parish of ST. LEONARD SHOREDITCH AND TRINITY PARISH, and adjudged a good settlement in that other parish where he last served; for it shall be still intended that he served his first master upon that agreement, and that it was but a continuance of his apprenticeship, and so it was adjudged in the principal case.——S. C. reported thus: A boy was bound apprentice by a woman to a farrier in St. Olave's. He served there 2 years, and then his master failed, and afterwards the master agreed with a farrier in Allhallows to serve with him, he finding clothes during the rest of the term; but the apprentice was not turned over either according to the custom of the city or otherwise, only by parol agreement. He served out his apprenticeship, and it was held a good settlement. And per Eyre, This service with the second master was in virtue of the contract with the first: That master had a right to the service of his apprentice, which he might give over to another by parol, without any contract in writing, and this service with his consent will be the service of the first master. It would have been good also, if the apprentice had gone and entered into covenant with the second master; and so good, whether a servant or an apprentice. And the case of TAYLOR the vintner was cited, who had two boys bound to him apprentices, and he put out one to the trade of a barber, and he served his time with the barber; and held a settlement where the barber lived. MS. Cases, Pasch. 9 Geo. B. R. S. C. by name of the King v. the Inhabitants of Allhallows', London-wall, and St. Olave's, Southwark.

An apprentice, though bound to one in one parish, and by his master assigned to one in another, if the indenture is not cancelled, is settled in the parish where the first master lived. 2 Shaw's Pract. Just. 54. cites 3 Ann. Parish of Thursley in Surrey's Case.——Nelf. Just. 556. S. P.——S. P. Just. Case Law, 241, 242.——Dalt. Just. 246. cap. 73. cites S. C.——Shaw's Parish Law, 158, cap. 35. f. 29. S. C.

22. A person was bound apprentice to a gentleman who made use of him as his huntsman, and lived with him three quarters of a year, and then ran away; per Cur. here is a living for 40 days, and so the person gains a settlement. It was objected, that he served a gentleman, and consequently no trade; but per Cur. he is bound out as an apprentice, and the master may make use of him in what manner he pleases, and therefore held a settlement accordingly. Poor's Settlements, 122. pl. 166. Trin. 1726. B. R. the King v. the Inhabitants of Whitchurch.

23. J. S. agreed to be put apprentice to J. N. and was bound for 7 years, and 20s. was paid J. S.'s mother; after J. S. had served three years his master died. The indentures were not stamped, nor the duty paid; on an order of sessions that it was a settlement, and a reference to the judges of assize, Fortescue J. was of the same opinion, but it was moved to quash it, because 3 & 4 W. & M. says apprentices bound by indenture shall be entitled to a settlement, and this indenture, being not stamped, is as no indenture by 8 Annæ, and so held the Court. 4 Geo. 2. B. R. Gibb. 167. Anon.

## (L) Decrees in Equity relating to Apprentices. [ 32 ]

1. IT was said to be usual in case of apprentices, after they are out of *their time*, to exhibit a bill to put their masters to sue their covenants within a certain time, or else to deliver up *their indentures*. Chan. Cases, 70. Hill. 17 & 18 Car. 2. Baker v. Shelbury.

2. Freem. Rep. 184. pl. 257. S. C. accordingly; for witnesses may die.

2. Apprentice, being *ill used*, brought his bill. Decreed that the master deliver up the indentures, and a bond of 100l. for his *honesty*, and repay part of the money given with the apprentice, with full costs; the apprentice having before had a verdict in the lord-mayor's court, and the master ordered to provide a new master, which he refused to do. Fin. Rep. 124. Mich. 26 Car. 2. Lockley, Widow and Executrix of Lockley, and David Lockley v. Eldridge.

3. Bill by a merchant against one that was his apprentice, for an account of goods and money which he was entrusted with, both during his apprenticeship and after, as his factor and agent. The defendant pleaded the statute of limitations 21 Jac. The plea was allowed good as to the goods, &c. received during his apprenticeship, and till he was made free, but not after his apprenticeship ended; so ordered to answer that part of the bill, but without costs. Fin. Rep. 370. Trin. 30 Car. 2. Fincham v. Hobbs.

4. The master received with the apprentice 250l. and died within 2 years, the apprentice having for that time been employed only in inferior affairs. Decreed, after debts and specialties paid, that the executors repay the 250l. as a debt due on simple contract, deducting after the rate of 20l. per ann. for the maintenance of the apprentice during the time he lived with his master. Fin. Rep. 396. Mich. 30 Car. 2. Soam v. Bowden & Eyles.

5. A. placed his son as clerk to an attorney, and gave with him 120l. The master agrees to return 60l. of the money, if the master died within a year. The master was sick at the time, and of that sickness died within three weeks. Jeffries C. decreed 100 guineas to be paid back to A. Vern. Rep. 460. pl. 437. Trin. 1687. Newton v. Rouse.

6. An apothecary turned away his apprentice for negligence and misdemeanors laid to his charge, but the Court decreed the master to refund 30l. of the money he had with him, and the rather, because the indentures were not enrolled, so as the matter was not properly cognizable before the chamberlain of London. 2 Vern. 64. pl. 57. Trin. 1688. Therman v. Abell.

7. A bond of 50l. given by one apprentice to another apprentice for money won at play, decreed to be delivered up. 2 Vern. Rep. 291. pl. 281. Trin. 1693. Woodroff v. Farnham.

8. Indentures of apprenticeship were decreed in the Mayor's Court of London, whither the cause was sent back out of Chancery, to be delivered up, because not enrolled, though the non-enrolment was at the instance of the mother, which could not excuse the master, who had

had covenanted to enrol the indentures; and although the apprentice was bound for 7 years, yet he covenanted to make him free at the end of 5 years. 2 Vern. 492. pl. 443. Hill. 1704. Stephenfon v. Houlditch.

[ 33 ] 9. A. puts his son apprentice to B. and gives 1000*l.* bond for his fidelity, and at the same time B. covenants with A. to see the apprentice make up his cash once a month at least. Per Wright K. The meaning is that B. not only see the figures right, but the cash effectually made up, so that B.'s pretence that the apprentice had inserted banker's notes, &c. as remaining, when he had disposed of them, is no excuse, and the bond and covenant are as one agreement, that the plaintiff A. would be answerable monthly, provided accounts were taken monthly, and would be liable but for one month's embezzlement, and decreed A. to answer no more than B. proved embezzled in the first month, when the embezzlement began. 2 Vern. 518. pl. 468. Mich. 1705. Montague, Executor of Ewer, v. Tidcombe & Hoskings.

For more of Apprentice in general, see *Master and Servant, Trade*, and other proper titles.

## Appropriation.

Fol. 238.

(A) By what Patron. [*And who must assent to it.*]

Br. Appropriation, pl. 6. cites S. C. & S. P. because it is not mortmain; for he had the patronage before, and so he has still, and holds now as he held before; and so it seems that the licence of the king is always necessary.

[1.] IF an abbot be seised of an advowson in fee, held of a common person, an appropriation may be made thereof to him by the king and the ordinary, without the assent of the lord of whom it is held. 21 Ed. 3. 5. b.]

For in every case of appropriation of a benefice to a house [2. The patron of the advowson ought to agree to the appropriation, otherwise it is not good. Com. Grendon, 497. b. Curia, 29 E. 3. 10.]

of religion, the patronage is thereby gone and extinct for ever. Kelw. 48. b. pl. 2. at the end, cites it as said by Frowick in 3 H. 7. Quod nota.—An appropriation cannot be without the assent of the patron; per Doderidge J. Roll Rep. 464.—It cannot be made without the patron; for his advowson being a lay-inheritance, cannot be divested without his consent; neither can it be made without the consent or concurrence of the king, because the advowson itself is held of him mediately or immediately, and he shall not lose his possibility of escheat or lapse, without his consent; but an appropriation may be made by the patron, and the king acting as supreme ordinary without

*without the bishop*; and the reason is, because before the reformation it might have been made by the king, by the patron, and the pope, and whatever the pope might have done is now vested in the king, by the statute of H. 8. 3 Salk. 43. [out of pl. c. 18 & 19 Eliz. Grendon v. the Bishop of Lincoln.] — And therefore the king uses the following words in his charter, (*Auctoritate nostra regia suprema & ecclesiastica qua fungimur.*) pl. c. 498. Grendon v. the Bishop of Lincoln.

[3. If there be *lessee* for years of an advowson, the *reversion* in *fee*, the assent of the reversioner to appropriate the church is not sufficient to bar the lessee for years. 29 E. 3. 10.]

[4. An appropriation can *not* be made *without* the assent of the *ordinary*, because of his interest in the lapse. Contra 34 E. 3. Quare Impedit, 197.]

But formerly it was taken as good, if made by the

pope without the ordinary, in regard he was look'd upon as supreme ordinary. Pl. c. 497. b. 498. The Case of Grendon v. the Bishop of Lincoln.

[5. 19 Ed. 1. Rot. Pat. Membrana 25. in Scheda annexa. [ 34 ]  
The archbishop of Canterbury, with the consent of the dean and chapter, appropriated a church of his diocese, and belonging to his collation, to a hospital of lepers in compensationem summæ pecuniæ debitæ by the archbishop; and now the successor of the archbishop, with the consent of the pope, and of the dean and chapter, and of the master of the hospital, revoked the appropriation.]

[6. An appropriation by King William the Conqueror only, is not good. 7 Ed. 3. Quare Impedit, 19. adjudged.]

An appropriation made by the king only,

without the bishop, is as good as if made by the bishop, or as good as if made heretofore by the pope; but neither the bishop or the pope could make it without the good will of the patron and the king, and in appropriations the patron is a party; for he ought to accept it. Pl. c. 498. a.

An appropriation may be by the king alone, where he is patron; but there is no book that it might be by the patron alone; [per Cur. as it seems.] Poph. 144. Trin. 16 Jac. B. R. obiter, in Case of Nicholas v. Ward.

[7. 2 H. 4. Rot. Parl. numero 51. The Commons prayed that no appropriation of any church at any time thereafter should be made, and he that should enjoy such appropriation for the time to come should incur the pain contained in the statute of provisors, except religious, or other persons whatsoever, who have (having) possessions amortized, might exchange or give such possession amortized to a secular hand, to have any such benefice appropriated by the licence of the king, patron, lord, and founder. Answer, The king will advise.]

8. In assise of darrein presentment, appropriation of the advowson was pleaded in the time of King H. 3. by licence of the king, and of the bishop, and dean and chapter, and of the apostle (pope) and he himself who appropriated was patron, as he ought always upon appropriation; and so it seems here, that the licence of the bishop is not but for his time, without the dean and chapter. Br. Appropriation, pl. 4. cites 46 Aff. 4 and 19 E. 3. Fitz. Judgment 124.

Br. dean and chapter pl. 18. cites S. C.

9. Appropriation of an advowson cannot be, but where the spiritual man, who appropriates it, has the advowson to him, and to his successors. Br. Appropriation, pl. 3. cites 38 H. 6. 21. by the Master of the Rolls.

## Appropriation.

(B) To *whom* it may be.

[1. AN appropriation of a church may be to a *bishop, and his successors*, Da. 1. 80. b.]

[2. Constitutiones Othoboni capitulo de appropriationibus ecclesiarum non faciendis, in Linwood, fol. 51.]

[3. An appropriation of a church may be to the *dean of a free chapel of the king*. 33 Ed. 3. Aid del Roy. 103. admitted.]

[4. A church may be appropriated to *two priories*, for this is not as if a woman was married to two husbands, for both may well have the care of one church. Mich. 15 Jac. B. R. in *Freeston and Kemp's Case* Doderidge said, that upon the trial of this Case in his last circuit, such appropriation was given in evidence confirmed by the pope; and he (\*) inclined that this was a good appropriation, as well as a parsonage may be the body of two prebends, as 21 Ed. 3. is, but the Court said, this is a strange and rare Case, to have such appropriation; quære this Case, for he, to whom the appropriation is made, ought to have the advowson of the church, and therefore it seems that it ought to be intended that the priors were *tenants in common* of the advowson.]

\* Fol. 239.

An appropriation is always to the patron. Hob. 152.

\* [5. An appropriation can not be but to him who is *patron and parson*. 14 H. 4. 14.]

\* [35]

6. At *common law* an appropriation could not be made, but to a body politic, or to a *corporation*; for a natural person is not capable of it because he cannot be perpetual, and an appropriation makes an incumbent perpetual. And at *common law* it could not be made to a *lay person*, for as he could not be an incumbent by a presentation, so he shall not by an appropriation, which is but a more lasting incumbency. These appropriations at first were made to *abbots, deans, and sole corporations, who might administer sacramentals, and had care of souls*; but afterwards by dispensations they were made to *spiritual corporations aggregate, who had no cure of souls*, as to *deans and chapters*, and at last to *nuns*, under pretence of hospitality. *Grande nefas*, as Dyer calls it. 3 Salk. 43. (abridged from pl. c. 496. b. &c. Grendon v. Bp. of Lincoln).

(C) For what *Causes* it may be.

[1. AN appropriation may be made to an abbey or priory *causa paupertatis*. Constitutiones de othoboni capitulo de appropriationibus ecclesiarum non faciendis in Linwood, 51.]

[2. An appropriation ought to be made but *causa paupertatis* only, or other *lawful cause*. Constitutiones de Othoboni capitulo de appropriationibus ecclesiarum non faciendis in Linwood, fol. 51.]

(D) At what *Time* it may be made.

Appropriation may be made by the

[1. NO appropriation can be made of a church which is *full of an incumbent*, but in a special manner to take effect after



ter the death of the incumbent. Co. 11. *Priddle and Napper*, king the patron, and the ordinary in the life of  
11. Com. Grendon 499. b. vide 50 E. 3. 27. admitted good in presenti.]

the parson, to take effect after his death, or after resignation, and well; quod nota. Br. Appropriation, pl. 2. cites 50 E. 3. 26.—Br. Quare impedit, pl. 42 cites S. C.—Fitzh. Grants, pl. 53. cites S. C.—Br. Apportionment, pl. 5. cites 6 H. 7. 13. 14. that if appropriation be made when the church is full, it is void.—S. P. by Hobart Ch. J. that in such case it is utterly void, unless it be made by express words, de futuro quando vacaverit. Hob. 150. at the end cites Grendon's Case.

[2. But when the church is full, it may be appropriated by \* As by saying that the patron who is a spiritual person, shall after it becomes void, be parson, and may  
\* proper words. Co. 11. *Priddle and Napper* 11. Com. 499. b. 41 Ed. 3. 6. b. + 50 E. 3. 26. b. 27.]

[3. As when a church is full, it may be appropriated by words in futuro after the death of the incumbent. Com. 499. b. Co. 11. *Priddle* 11.]

retain the glebe, and the fruits to his proper use; this will make a good appropriation when the present incumbent shall die, or an avoidance happens; and the doubt which had been conceived to the contrary before, was, because the present parson had fee simple in the mansion, and glebe, and tithes, and no reversion or interest in any other, but in the incumbent, when there is one; agreed by all the justices, pl. c. 499. Mich. 18 and 19 Eliz. Grendon v. the Bishop of Lincoln, &c. + See the references in the notes at pl. 1.

[4. If a prior was seised of an advowson in fee, this being then full of an incumbent, and the king gave to him licence to appropriate this church, and to hold it appropriate without mentioning the incumbent, and after the ordinary appropriates it, ita quod after the death of the incumbent the prior and his successors possint tenere in propriis usus in this case, though the licence of the king be general without mentioning the incumbent; yet the appropriation being after well made, this is a good licence and a good appropriation. Co. 11. *Priddle and Napper* 11. resolved. Mich. 16. Car. B. R. between Foe and Hasseltrigg per Curiam upon evidence at the bar agreed.] 11 Rep. 11. [ 36 ]

[5. If the king gives licence to a chantery to purchase an advowson of a church in fee, and to appropriate it to them and their successors, and afterwards they purchase the advowson in fee, and after present their clerk to the church upon a permutation, who is instituted and inducted, and after the bishop appropriates it to them and their successors, this is a good appropriation, notwithstanding the intervening presentation made by themselves, between the licence and appropriation. Mich. 16. Car. C. R. between Foe and Hasseltrigg per Curiam upon evidence at the bar ruled.]

6. If an appropriation be in the incumbent's life-time by future words, as it may, yet it will not be executed till after the avoidance. Pl. C. 500. b. Grendon v. Bishop of Lincoln.

b. in S. C. of *Priddle* and *Napper* says, the licence of appropriation is always general, and that so are all the precedents.

## (E) How it may be made.

Fol. 240.

[1. If the king gives licence to the warden and chaplains of a chantery to purchase an advowson of a parochial church presentative, to them and their successors, and to have this appropriation to them and their successors, and after this is appropriated

to the warden of the chantery and his successors by the bishop by force of this licence, if the chantery be known as well by the name of warden and successors, as by the name of warden, and chaplains, and successors, and so all one corporation, this is a good appropriation. Mich. 16. Car. B. R. between *Foe and Hasselrigg*, per Curiam, upon evidence at the bar (but *quere* how a corporation aggregate and a sole corporation can be one corporation politic).]

Tho' the statutes 15 R. 2, and 4 H. 4. say, that there must be a vicarage endowed upon every appropriation, yet they do not extend to appropriations prior to the making of the said acts; Arg. Gibb. 251. Palch.

2. 15 R. 2. cap. 6. In every licence to be made in chancery of the appropriation of any parish church, it shall be expressly provided, that the diocesan, according to the value of such churches, shall ordain a convenient sum of money out of the profits of the said churches, to be distributed yearly by the appropriators to the poor parishioners; and also, that the vicar be sufficiently endowed.

3. 4 H. 4. cap. 12. Churches appropriate since 15 R. 2. contrary to the said statute, shall be reformed, or the appropriation to be void.

From henceforth every church to be appropriated shall have a secular priest ordained perpetual vicar thereof, and canonically instituted and inducted in the same, and convenably endowed by the discretion of the ordinary to do divine service, and keep hospitality.

4 Geo. 2. B. R. in Case of the Bishop of London and Lewen v. the Mercers Company.

A prior was seised of the advowson of a parsonage, and 24 H. 8. the church being void, the bishop gave him licence to hold in proprios usus, and there was not any endowment of the vicarage. The question was. whether the appropriation was good, there being no endowment of the vicarage, this statute being in the affirmative, that vicarages shall be endowed, or that all appropriations are void unless the vicarage be endowed? and whether an appropriation by the bishop's licence without the king's, be good? Williams J. said, that it had been resolved, that whether appropriations be good or not cannot now be called in question, but they shall be intended to be good, and to have all requisite circumstances. Cro. J. 252. pl. 6. Mich. 8 Jac. B. R. *Hunston v. Cocket*.

[ 37 ]

5. If a bishop, dean, or the like, has the advowson to him and to his heirs, and appropriates it by licence to him and his successors, this is not good, because he had it not to him and his successors before, but there he ought to alien in fee to another, and then retake to him and his successors by licence, and then to appropriate it by licence, and detain in proper use without presenting a stranger, because otherwise he is bound to present an incumbent as the patron shall do, and cannot retain more than 6 months without lapse; Quod Nota. Br. Appropriation, pl. 3. cites 38 H. 6. 21.

In an appropriation of great antiquity a licence has been presumed tho' none appeared. Arg. Vent. 257. in an anonymous case.

6. The appropriation was made by the patron and the ordinary and the dean and chapter by licence of the king, without any mention of the licence of the patron. Br. Appropriation, pl. 8. cites Lib. Intrat.

7. An appropriation of an advowson, church, glebe, tithe, &c. must be to some body politic or corporation, and when it was made by the patron or first founder the form was thus; *Ego W. R. de H. concessi ecclesiam & advocacionem meam de H. cum terris & decimis omnibus ad eam pertinentibus abbati de S. &c.* so that not only the advowson and profits of the church, but the incumbency itself, which

which is a spiritual thing, vested in the appropriator. Pl. C. 496. b. Grendon v. Bishop of Lincoln.

8. Watf. Comp. Inc. 8vo. 341. cap. 17. says, That the safest way is, that it be expressly said that he to whom the church is appropriated shall be parson, and that in all grants of advowsons from the crown to any spiritual parson and his successors the clause of non-obstante the statute of mortmain be inserted, or that a precedent licence be had, and that these matters be pleaded when any action is brought concerning the same.

## (F) What Act or Thing will *disappropriate* an Appropriation; and by whom. The Act of the Party.

[1. IF the parson appropriate *presents* to the church, and the *presentee* is instituted and inducted, this disappropriates the church. 44 E. 3. 33. b.]

Br. Consultation, pl. 1. cites S. C. — Fitzh. consultation.

pl. 4. cites S. C. — See (G) pl. 2. in the notes there, where it is said that the law seems the same thro' there be no institution &c. — S. P. by Manwood pl. c. 501. 2. Mich. 18 & 19 Eliz. in Case of Grendon v. the Bishop of London. — Hob. 152. Hobart Ch. J. says, that no act of the ordinary can disappropriate the church; but if the parson appropriate (who is patron) had presented, it did disappropriate, and cites 38 H. 6. 20. 11 H. 6. 18. F. N. B. 35. and says he is of opinion, that if his clerk be refused for just cause, and notice given, lapse shall incur; for the appropriation gives him a charge to hold or not, as appears by the form of an appropriation in Grendon's Case, which by the presentment he has renounced.

[2. If there be a *parson appropriate* and *vicar endowed* of the same church, and after the *parson* and *ordinary* re-unite the *vicarage* to the *parsonage*, yet this does not disappropriate the appropriation, for the vicarage was derived out of the parsonage, and now it is come back to that out of which it was derived, and so it is in its first state, and therefore cannot disappropriate the church. 7 Jac. resolved at Serjeant's Inn by the judges upon a reference out of the Court of Wards, in one *Stafford's Case*.]

[ 38 ]

[3. If a *chapel* be annexed to a church, if there be a *presentation* by a *stranger* to the chapel as to a church, and his clerk is inducted, this chapel is hereby made a church. \* 47 E. 3. 5. 21. b. 17 E. 3. 58.]

\* Br. Quare Impedit, pl. 39. cites 47 E. 3. 4. that if, the king presents to

the church, in such case, as to the church, it shall thereby lose the name of a chapel.

[4. If *lessee for years* of an appropriation presents thereto a *chaplain*, and he is inducted, this disappropriates the church during the years. 44 Aff. 37. 44 E. 3. 33. admitted.]

For he is patron during the Term. Br. Consultation, pl. 1. cites S. C. — Fitzh. Consultation, pl. 4. cites S. C.

5. If an *incumbent* be presented by the abbot, and admitted after the appropriation, by this the appropriation is determined for ever. Br. Spoliation, pl. 4. cites 38 H. 6. 19.

By such presentation the patron and ordinary have gained interest de novo; by Shute Baron. Sav. 21. in pl. 51. Pasch. 24 Eliz. obiter. Clench doubted, but Manwood agreed. — 3 Le. 101. pl. 147. Trin. 26 Eliz. Manwood Ch. B. said, that at this time

interest de novo; by Shute Baron. Sav. 21. in pl. 51. Pasch. 24 Eliz. obiter. Clench doubted, but Manwood agreed. — 3 Le. 101. pl. 147. Trin. 26 Eliz. Manwood Ch. B. said, that at this time

time a parsonage may be disappropriated, but that ought to be by a judicial act, as by presentment, and not by any private act of the proprietor, and so, he said, a church was disappropriated by the Id. Dyer by a presentment which he of late made to it.—2 Le. 80. pl. 106. S. P. in *videtur* verbis.

As in the  
Case of the  
Templers, a  
church ap-  
propriated  
to that

order could not be by them transferred to the hospitallers, but what was appropriated to them was disappropriated by the dissolving of their order. Pl. c. 497. a. in S. C. cites it as said by Herle in 3 E. 3.—[This is Pasch. 3 E. 3. 11. b.]

The statute  
of 31 H. 8.  
makes all  
appropriations lay fee,  
and not appropri-  
ations and they are  
never pre-  
sentative nor spiritual functions; per Cur. Jo. 3. pl. 3. Mich. 18 Jac. B.R. in the Case of Wright v. Gerard and Hilderheim.

6. If a church is appropriated to a corporation which is dissolved, the church is hereby disappropriated; per Dyer Ch. J. pl. C. 501. a. Mich. 18 and 19 Eliz. in Case of Grendon v. Bishop of Lincoln.

7. All the appropriations of abbeys that were surrendered between 27 and 31 H. 8. were ipso facto dissolved with the dissolution of the corporation, and were presentable, and might have new incumbents. But as soon as the statute of 31 H. 8. came, the appropriations were restored and given to the king, and the incumbents ousted; per Hobart Ch. J. Hob. 308. Hill. 15. Jac.

8. 17 Car. 2. cap. 3. §. 7. Owners of impropriations may unite the same to the parsonage and vicarage of the parish church where the same do lie.

## (G) Acts of a Stranger.

[1. IF a man recovers the advowson in a writ of right, this disappropriates the church, 17 E. 3. 51. b.]

[ 39 ]  
Br. Consulta-  
tion, pl. 1.  
cites S. C.  
—Fitzh.  
Consulta-  
tion, pl. 4.  
cites S. C.  
—A present-

ment made by a stranger unto an advowson, which is appropriated to an abbey, be the presentment in the time of vacation, or in the time of the abbot, is void, although that the clerk be instituted and inducted; but if the abbot himself present unto the bishop his clerk to an advowson which is appropriated to his house, this presentment doth disappropriate the advowson, and make it presentable after; and if he do not present within six months after every avoidance, the bishop shall present for lapse. F. N. B. 35. (F)—So that it seems the presentment without institution &c. is a disappropriation. F. N. B. 35. (F) in the new notes there (b) cites 11 H. 6. 32. 33. Br. Quare Impedit, 38. 111. 38 H. 6. 39.

[2. If a stranger presents, and his clerk is instituted and inducted for seven years, this continuance for this time hath appropriated it, till it be recovered again by writ of right; 44 E. 3. 34. 44 Ass. adjudged (but it seems that this is not law, for, Co. 5. 101. per Curiam, there cannot be an usurpation upon such an appropriation.)]

If advowson  
of a church  
by licence  
be granted  
to a prior,  
or his succes-

sors, and after the same church is appropriated to him and his successors, so that they are perpetual parson imparsonnee. If in this case, the same of the grantor is endowed of the advowson, and presents a clerk, who is instituted and inducted, the appropriation is defeated for ever; for the in-

[3. If a woman be endowed of an advowson, which is appropriate, and she presents, and he thereupon is admitted, instituted, and inducted, this disappropriates the church. 2 E. 3. 8. per Scrope said to be adjudged. Co. Lit. 46. h.]

the estate of the parson impropriate is avoided. 7 Rep. 8. in the E. of Bedford's Case, cited per Cur. to have been so adjudged, as Sir Jeffery Scrope reported in 2 E. 3 fol. 8. and says, that in such sense is the book to be understood, and that so a quere in Dyer, 6 E. 6. fol. 7. a. [72] is well resolved.

## (H) *Who* shall be bound by the Disappropriation.

[1.] If a *lessee for years* of an appropriation present thereto, this disappropriation shall not bind him in the *reversion*. Vide 44 E. 3. 33. b. 44 Aff. 37. admitted.]

Br. Consultation, pl. 1. cites S. C.— Fitzh. Consultation, pl. 4. cites S. C.

[2. If a *feme* be *endowed* of an advowson which is appropriate, and *presents*, and her *clerk* is instituted and *inducted*, though the *incumbent dies*, yet is the appropriation wholly dissolved, because the incumbent who came in by presentation, had all the estate in him. 2 E. 3. 8. per Scrope said to be adjudged, Co. Lit. 46. b.]

## (I) The Effect thereof as to spiritual Jurisdiction.

1. If *Impropriator* was sued in the ecclesiastical court, and by sentence there, the profits were *sequestered for repair of the chancel*; the matter went off for a fault in the pleading; but the Court, as to the matter of law, inclined that there could be no sequestration, for being made a *lay fee*, the impropriation was out of their jurisdiction, and it was now only against the parson, as against a layman for not repairing the church. 2 Vent. 35. Pasch. 32 Car. 2. & B. Walwin v. Auberry.

Mod. 258. pl. 13. Anon. Trin. 29. Car. 2. adjournatur.— 2 Mod. 254. S. C. & ibid. 256. the whole court præter Atkins J. held, that

the lay appropriation was not to be sequestered for the repairs of the chancel; but judgment was given against the defendant upon the point of pleadings, which all the court agreed to be ill.— Freem. rep. 230, pl. 240. S. C. adjournatur.

2. The Court seemed of opinion, that notwithstanding the appropriation of a benefice to a prior, or a dean and chapter, the bishop may visit to see how the church was served, sacraments administered &c. and might proceed to suspension ab officio & beneficio; but they held clearly, that he could not deprive him. 10 Mod. 68 Mich. 10 Ann. B. R. Dr. Harrison v. Dublin (archbishop). [ 40 ]

For more of appropriation in general, see Presentation, WATSON'S CLERGYMAN'S LAW, cap. 17. MALORY'S QUARE IMP. 40 to 46.

HOLDEN'S  
LIBRARY  
40 to 46

## Arbitrement.

(A) *Of what Things it may be.* [Or, of what Things an Award may be made, in respect of the Thing to be awarded.] [Things Real.]

\* S. P. by Culpepper, accordingly, quod nemo negavit, except Skrene, who said that the arbitrator cannot award the frank tenement without deed; but that if they put themselves in arbitrement, and make writing thereof by deed indented, it is good, and may be pleaded in bar, ad quod non fuit responsum. Br. Arbitrement, pl. 15. cites S. C.

[1. **ARBITRATORS** cannot make an award of a *freehold*, as to adjudge the land of one to another. \* 14 H. 4. 19. 23 H. 8. Keil. 99. b.]

\* Fitz. Arbitrement, pl. 16. cites S. C. accordingly, [2. The law is the *same*, if the submission be *by deed*. \* 9 E. 4. 44. the law is the *same*, if the submission be *by deed indented*. 14 H. 4. 19.]

but by Needham, if he does not perform it, the obligation of submission is forfeited.—Arbitrement *for freehold* is not good, unless the submission be by deed indented; per Foster J. 2 Brownl. 130 Peto v. . . . cites 11 H. 4. 44. b.

It is a question, whether the *title to land* is submissible, because it is in the realty; per Powell J. but Treby Ch. J. said, *that things in the realty might be submitted*, as well as things in the personalty, *but they could not be recovered* upon the award. Ld. Raym. Rep. 115. Mich. 8 W. 3. in Case of Marks v. Marriot.

Cro. J. 74. pl. 4 Trin. [3. A *partition* cannot be made by award, for a freehold cannot pass without livery. Pasch. 1 Jac. B. Horton v. Horton.]

3 Jac. B. R. is S. P. [4. An arbitrator cannot make an award of a *lease for years* of land, as to adjudge the land of one to another, by which the interest and estate of one shall be transferred to the other, because this is a chattel real.]

A controversy between two, concerning a *lease of lands*, was submitted to the arbitrement of J. S. who awarded, that one of them shall have the lands; this is a good gift of the interest of the term, and cites 12 Aff. 25. but if it had been, *that he should permit the other to enjoy the term*, this would not give an interest in it; and so it was agreed upon evidence. Cro. E. 223. pl. 3. Pasch. 33 Eliz. B. R. Truitt v. Yewre. 2 Le 104. pl. 130. Pasch. 31 Eliz. B. R. Truitt v. Ewer, S. C. & S. P. agreed for law, and cites 12 Aff. 25. 14 H. 4. 19. 24. & 9 E. 4. 44.—S. C. cited D. 113. a. pl. 57. Marg. by the name of Frelou v. Eure, and says, that the same diversity was agreed.—But it is said there, that if the arbitrators award *that the possessor should hold the term*, it seems that this would not bind the right of the other, for the award does not extinguish the right there, as it does to pass the possession in the other case. Ibid.

[ 41 ] [5. It seems, that in Co. 9. Peytoe 78. this is admitted, for Sec (U) pl. there it is held, that an award is *no plea in an ejectioe firmae*, because it is an *action of trespass*.] 11. S. C. contra.— See (Y) pl. 1. S. C. accordingly.

Br. Arbitrement, pl. 25. cites S. C. [6. An arbitrator may make an award of the *arrearages of a rent*, reserved upon a lease for years, 4 H. 6. 17. b.]

& S. P. by Martin—See (R) pl. 6, S. C. and the notes there.—See (U) pl. 8, 7. Arbitrement,

7. Arbitrement, *that the one party shall have land out of the possession of the other*, does not give franktenement; and if he *refuses to permit him to have the land, he has no remedy if he has no obligation to stand to the arbitrement.* Br. Arbitrement, pl. 53. cites 21 E. 3. 26.

8. An award was, *that the plaintiff should pay the defendant 30l. in full satisfaction of all demands the 13th of Sept. and that defendant on payment should surrender up to the plaintiff the possession of a house in which he lived, and deliver the plaintiff a deed whereby the house was intail'd to the plaintiff &c.* The plaintiff paid the 30l. The court held the award good; and judgment for the plaintiff. Ld. Raym. Rep. 114. Mich. 8 W. 3. Marks v. Marriot.

## (A. 2) Arbitrators. What Persons may be.

1. **N**EITHER *natural or legal disabilities* do hinder any one from being an arbitrator. If they are incompetent judges, the fault is in those that chuse them. They are called arbitrators, because they have an arbitrary power, if their judgment be according to the submission. If they observe their commission, and keep within their jurisdiction, their sentences are definitive, from which there lies no appeal. R. S. L. 1 vol. 103. cites Wood. 921.

2. A *bond* is given to J. S. to stand to his award by the parties in difference, being J. D. and J. R. Adjudged good by the Court, tho' it was objected that the referee would make an unreasonable award, to intitle himself to the penalty of the bond. Cumb. 100. Mich. 4 Jac. 2. B. R. Owdy v. Gibbons.

3. Submission was *to the plaintiff himself and another*; and this being objected in arrest of judgment was held good; per Cur. Cumb. 218. Mich. 5 W. & M. in B. R. Matthew v. Ollerton.

4 Mod. 226.  
S. C. and  
the objec-  
tion was not  
allow'd.

4. Dolben J. said he remember'd a case where a gentleman's steward brought an action in his master's name, and defendant enter'd into rule by consent *to pay what the plaintiff should think fit*; and my Ld. Hale held it to be a good submission. Cumb. 218. Mich. 5 W. & M. in B. R. in Case of Matthew v. Ollerton.

4 Mod. 226.  
says Dolben  
J. cited it  
as serjeant  
HARDY'S  
Case, and  
that it was  
thus, viz.  
The ser-

jeant took a horse from the archbp. of Canterbury's steward, for a deodand, and the archbishop brought his action; and it coming to a trial at the assises in Kent, the serjeant by rule of Court referred it to the archbishop to set the price of the horse, which he did; and the serjeant afterwards moved the Court to set aside the award, because the submission was *to the plaintiff himself*; but it was denied by my Ld. Hale and the whole Court.

[ 42 ] (B) Where the Submission is with a Condition to perform it, in what Cases the *Condition* is *broke*, if it be not performed. Condition. Award.

\* Br. Arbitrement, pl. 18. cites S. C. & S. P. seems admitted. [1.] If the condition of an obligation be *to perform an award between the parties of such things*, if the arbitrator awards *a thing to be done merely out of the submission*, he is not bound to perform it. \* 8 H. 6. 18. b. 9 E. 4. 43. b. 44.]

Br. Arbitrement, pl. 18. S. C. and S. P. seems admitted. [2. But *otherwise* it is if the award be of *a thing depending upon the principal*. 8 H. 6. 18. b.]

See (C) pl. 8. S. C. & S. P. and the notes there. [3. If the *submission* be of *a term*, and *all thereupon depending*, and the *award* is made of *the rent* which shall become due at *Michaelmas next ensuing*, this is void, because it is not within the submission, and the obligor is not bound to perform it. Mich. 10 Jac. B. R. between *Grey and Wicker*, adjudged.]

\* Roll Rep. 437. pl. 2. S. C. & S. P. agreed accordingly by the counsel and the Court, as to the making a release to the time of the award. —Bridgm. 58. *Vanlore v. Dribble*, S. C. & S. P. accordingly. [4. If the condition of an obligation be to perform an award of *all actions between them*, and the arbitrators make an *award that one shall make a release to the other of all actions till the day of the award made*, which was after the submission, this is a void award, because it comprehends more time than was submitted; for by the submission such actions only which were then between them were submitted, and this is entire, and therefore the obligor is not bound to perform it. My Reports, 14 Jac. \* *Vanlore against Tribb*, adjudged. Co. 10. † *Moore and Beedle*, 131, 132. adjudged. p. 42 El. † *Knap and Mawe*, Rot. 211. adjudged. p. 12 Jac. B. R. between ¶ *Lindsey and Ashton*, adjudged. M. 13 Jac. B. R. between ¶ *Lumley and Hutton*.]

—But see infra pl. 27. —(C) pl. 3. —(M) pl. 4. —(N) pl. 1. and the notes there. † Gouldsb. 91. pl. 4. Trin. 30 Eliz. S. C. held accordingly by all the justices; sed adjournatur. —Le. 170. pl. 238. *Bedel v. Moor*, S. C. but S. P. does not appear. —Jenk. 264. pl. 67. S. C. adjudged. † S. C. cited Roll Rep. 437. pl. 2. as adjudged. —S. C. cited Bridgm. 59. as adjudged. ¶ Godb. 255. pl. 352. S. C. but I do not observe any thing said as to this point. —Roll. Rep. 6. pl. 7. S. C. & S. P. agreed by Haughton, and admitted per Cur. —2 Bulst. 38. S. C. but nothing said as to this point. ¶ Cro. J. 447. pl. 27 Mich. 15 Jac. S. C. & S. P. agreed per tot. Cur. accordingly. —Roll Rep. 268. pl. 44. S. C. says that the award was that he should give a release to the day of the date of the release. No judgment given. —S. C. cited by Doderidge J. as adjudged. Palm. 108. Pasch. 17 Jac.

Where an award is, *that the parties shall release the one to the other all actions to the time of the award*, if one who is to make a release tenders a release of all actions to the time of the submission, this was held by Windham J. a good and sufficient tender in pursuance of the award, (or rather of the submission, as the reporter says he intends it.) Sid. 365. pl. 13. Pasch. 20 Car. 2. B. R. *Baker v. Rochester*.

An award was, *that the defendant should release to the plaintiff to the time of making the award*. It was objected, that this would discharge the bond of submission. Sed non allocatur, because divers things are to be done together, and if all had been done the release would be no prejudice, and differs from the case where money is to be paid after the release is to be given; and judgment for the plaintiff. Raym. 169. Mich. 20 Car. 2. B. R. *Barker v. Durrant*.



[5. If the condition be to stand to the award &c. and the award is that one shall pay 15l. to the other, and that J. S. a stranger shall enter into an obligation to pay it at a certain day, this award is void as to the entry into an obligation by the stranger, and the obligor is not bound to perform it, because it is out of the submission. Co. 10. \* Moor and Beedle, 131. b. adjudged, and there cites p. 24 El. B. R. Rot. 2417. between † Ecclesfield and Malliard, adjudged.]

Fol. 43.

\* See (E) pl.

[ 43 ]

[6. So it is where the award is to pay a certain sum of money to a stranger who is out of the award, this is void. Co. 10. Moor and Beedle, 131. b. Contra † 22 H. 6. 46. b. Curia.]

1. S. C.  
† Cro. E. 4.  
pl. 1. Ec-  
clestade v.  
Maliard,  
S. C. the

award was, that one of the parties should pay to the son of the other party 5l. which was bequeath'd to him, and adjudged that the action did not lie; for he was not bound to pay the money, being to a stranger to the award.—Godb. 12. pl. 18. Anon. S. C. & S. P. held accordingly; for it is in the election of the stranger, whether he will accept the money or not.—S. P. and though the truth was, that the said stranger was attorney to the plaintiff, and that by the intent of the arbitrators he was to receive it for his master, yet because it was not recited expressly in the award that he should have it for his master, it was adjudged insufficient. D. 242. b. Marg. pl. 52. cites Trin. 3 Jac. B. R. Futrel v. White.

So where the award was, that the servant of the one party should pay to the servant of the other party 5l. the Court held the bond not forfeited; for the servants of either are strangers to the submission: but if the award had been, that one of the parties should pay to the servant of the other 5l. it had been good, because the master of the servant is party to the submission &c. 3 Le. 62. pl. 91. Trin. 18 Elis. B. R. Dudley v. Malory.—See (E) pl. 1. S. C.

† S. C. cited Godb. 13. pl. 18. and there is a quære made as to this case; for that it seems not to be law at this day.—See (E) pl. 4. S. C.

[7. If a condition be to stand to the award &c. and the award is that one shall assure lands to the other and his wife, where the wife is a stranger to the submission, there he is not bound to perform this award as to the wife. M. 37, 38 El. B. between Samon and Pitt, per Curiam.]

Cro. E. 438.  
pl. 40. S. C.  
Popham  
held the ar-  
bitrement to  
be void for  
this cause;

for it being an intire thing which was appointed to be done, and being void in part, it is void for the whole; but otherwise it is where he appoints two things to be perform'd, and the one is within the submission, and the other not, and they are awarded to be performed severally, it is good for what is within the submission, and void for the other. But to this point none of the other justices spoke.—Mo. 359. pl. 489. Sims v. Pit, S. C. & S. P. adjudg'd accordingly.—5 Rep. 77. b. 78. a. Samon's Case, S. C.—See (N) pl. 7.

[8. If A. is indebted to B. in 20l. by single bill, and they submit all matters between them to the award of J. S. who awards that A. shall pay a certain sum, scilicet, a lesser sum to B. in satisfaction of the said bill, tho' if he pays the money according to the award, yet this cannot be any bar of an action to be brought upon the said bill, because the action is grounded upon a deed; yet if each of them was bound to perform the award, he ought to pay the money, or otherwise he hath forfeited the obligation; for if he pays it, and the other sues the bill, he hath forfeited his obligation. Hill. 15 Jac. B. R. between Lumley and Hutton, adjudged, upon demurrer. M. 23 Jac. B. R. the same case.]

Cro. J. 447.  
pl. 27. S. C.  
adjudged for  
the plain-  
tiff; for it  
being a-  
warded that  
he shall pay  
it in satis-  
faction, it is  
therein im-  
ply'd that  
the plaintiff  
shall accept  
it in satis-

faction; and if he does not accept thereof, and sues the bill, he forfeits the bond; for he does not stand to the submission, which is a sufficient tie upon him that he accept thereof; and being accepted, the arbitrement is a good bar.—Roll Rep. 270. S. C. & S. P. by Coke Ch. J. to which Haughton J. agreed.—S. C. cited by Dodeside, J. Palm. 108.

[9. If a condition of an obligation be to perform an award, where the submission is of all matters depending, and the award is after

If a man  
submits a  
particular  
controversy,

and the arbitrators award general release, which are

executed, these release no more than the particular controversy. *Ld. Raym. Rep. 116.* cites it as resolved *Mich. 8 W. 3. B. R. Stevens v. Matthews.*

after made of all matters generally, this is void; and the obligor not bound to release the matters depending. *Tr. 4 Jac. B. R. between Hames and Armistead adjudged.*]

[ 44 ]  
Condition  
(A. c) pl.  
r. S. C.  
but not S. P.

[10. If two submit to the award of J. S. of all matters between them till the submission, and then each of them promises to perform the award, and J. S. after awards, that whereas one was bound in an obligation to the other, (which was made after the submission, and before the award) that the obligee should deliver up the obligation to the other in full satisfaction of all matters between them, and awards further in such manner that all was good, the aforesaid award was good; though this obligation be out of the submission, because it was made after the submission, yet he is bound to perform it, because it is to be given in satisfaction of matters contained within the submission, as a horse or money may be given in satisfaction, tho' they are not within the submission. *Trin. 15 Jac. B. R. between Nicklas and Thomas adjudged.* (Reporter [says] *quære* this, for this is a thing in action between them, and out of the submission, and so not like to the case of the horse, unless the horse was in dispute between them after the submission).]

[11. And it seems, that if the award be to give his horse to the other in satisfaction, that he is not bound to perform this, because this is out of the award, for he may as well award him to give his gown or other collateral matter, but money is mensuratum, and therefore it may be awarded to be paid in satisfaction. *Contra 9 E. 4. 44. per Moyle.*]

[12. If an award be that one shall serve the other two years in satisfaction of an action, he is not bound to perform this. *9 E. 4. 44. per Lit.*]

\* Fol. 244.

*Fitch. Arbitrement, pl. 16.* cites *S. C. per Moyle*, that the arbitrator has no power to make award of a thing real so as

[13. If the award be that one shall release all his right in certain lands (\*) of which the other is seised, in satisfaction of a trespass, he is not bound to perform this. *Contra 9 E. 4. 44. per Moyle.*]

[14. If the condition of an obligation be to stand to the award of J. S. for the title of certain land, and the arbitrator awards the land to one, and that the other shall release to him &c. tho' this award is void as to determine the right and to change the estate, because it is real, yet because it is within the submission he is bound to perform it. *9 E. 4. 44.*]

to determine the right of it; but per *Needham* the award is so far good, that if it be not performed the obligation is forfeited. — *Kelw. 99. b. pl. 6. Pasch. 23 H. 7.* it was held by *Grevil* and *Pollard*, that unless some personal thing be join'd with the title, right, &c. of land such arbitrement is void, and that an obligation with condition to obey such award is void also; but the book says *Quære*, for others held clear contrary if there were such words, viz. to shew title &c.

*Fitch. Arbitrement, pl. 16.* cites *S. C. & S. P.* accordingly by *Needham*.

[15. If the condition of an obligation be to stand to the award of J. S. of certain matters, and the award is that one shall make a release to the other, if they do not do it the condition is broke, though there is not any means to compel them to make the release itself. *9 E. 4. 44.*]

[16. If

[16. If the condition of an obligation be *to stand to the award* of J. S. if the *award* be *impossible* the condition is not broke. 8 E. 4. 1. b.]

[17. \* If the award be *to pay a sum at a day past*, the condition is not broke. 8 E. 4. 1.]

such a church peaceably and quietly without disturbance by the defendant, and that on 1 Nov. the defendant should deliver up the seats to the plaintiff. The defendant pleaded, that the plaintiff enjoyed the seats prout till 30 Oct. next after, on which day they were pulled down without his knowledge or consent, per quod he could not deliver them to the plaintiff on the said 1 Nov. The question was, whether this should excuse the performance of the award. The case was argued, but C. advokare vult. See 2 Mod. 27. Pasch. 27 Car. 2. C. B. Bridges v. Bedingfield. Roll Rep. 6. in pl. 7. Arg. cites 8 E. 4. S. P.

An award was, that the plaintiff upon all occasions should hold 2 seats in

[18. If there be a *controversy for a certain thing between A. and B. of the one part, and C. D. and E. of the other part, and C. in consideration of 6d. given him by A. and B. submits the matter for himself and D. and E. and assumes to stand to award, and A. and B. submit of the other part, and the arbitrators award that C. shall pay so much to A. and B. in satisfaction of the controversy, this is a good award, and C. is bound to perform it, though it concerns two strangers to the submission, for C. hath undertaken for them.* H. 14 Jac. Bullock v. Dalby and Gadwood at Serjeant's Inn in a writ of error adjudged, and the judgment affirmed. \* 22 E. 4. 25. M. 10 Jac. B. R.]

[ 45 /]

\* Br. conditions, pl. 182. cites S. C. that D. and E. are not strangers though they are not bound in the obligation, for they are named therein as well as C.

and therefore are not strangers to the obligation, because named in the condition thereof. Br. Arbitrement, pl. 41. cites S. C. but not exactly S. P.

[19. If the condition of an obligation be *to perform an award*, and the *award* is that the obligor and a stranger shall pay to the other party 10l. though this is void as to the stranger, yet it is good as to the obligor, and he is bound to perform it. M. 10 Jac. B. R. per Curiam, between Gray and Wicker.]

[20. If the condition be *to stand to the award* of J. S. and J. D. and they award that he shall stand to the award of another, he is not bound to perform this award. Hill. 37 El. B. between Lower and Lower, per Curiam.]

[21. If a condition be *to stand to the award* of J. S. of all matters, &c. *ita quod arbitrium fiat de præmissis*, and the award is made that one shall do two things, of which one is to make a release of all actions till the release which is out of the award, and so void, and the other is good, the obligor is bound to perform that which is good, because they are not intire, and though the award be that he shall release all actions, yet it does not appear that there were any actions between them, so that the release is made de præmissis for any thing that appears. My Reports, 14 Jac. Venlore and Tribb., adjudged.]

See supra, pl. 4 S. C. & S. P. — (C) pl. 3. S. C. — (N) pl. 1. S. C. and the notes there.

[22. So it would be a fortiori if the condition was without this clause *ita quod arbitrium fiat de præmissis*. Co. 10. Moor and Beadle, 131. b. adjudged, because there is a recompence of each side, though not all the recompence which was intended.]

[23. If a condition be *to stand to the award* of J. S. of all matters, &c. *ita quod arbitrium fiat de præmissis*, and the award is made

Hutt. 29. Allaboyter v. Clifford

S. C. and the Court agreed, that if he made a release until the date of the obligation it was a *made upon the premisses that one shall \* release to the other all matters till the award*, which is out of the submission; though there are matters between them which arose after the submission and before the award, yet the award is good, if it be not averred to the Court that there were matters between them in the mean time. P. 17 Jac. between *Atablaster and Clifford*, adjudged.]

good performance; and says that this case had been adjudged before between *Nichols and Goodie*.—S. C. cited 3 Lev. 344. in case of *Nicholas v. Chapman*. Mich. 4 W. & M. in C. B. in which case it was adjudged, that where an award was made to release all demands generally, this shall relate to the time of the submission only, and a release to such time is a good performance.—It was held, that an award of a general release of all demands till the time of the award is good; for nothing shall be intended to arise in the mean time; and if any new controversy or demand did happen in the mean time, the award as to that new demand or controversy is void, because it was not within the submission, and therefore it is a good performance of it to tender a release of all matters in controversy to the time of the submission, which is all that he is bound to release; and if any new controversy has happened, which is not to be intended, he that pretends to excuse the non-performance ought by his pleading to shew it. 1 Salk. 74. pl. 14. Trin. 2 Ann. B. R. *Simon v. Gavil*.—S. P. by Holt Ch. J. 2 Ld. Raym. Rep. 964. in case of *Squire v. Grevett* S. C.—See (O) pl. 1, 2, 3, 4, 5.

[ 46 ] [24. If the condition be to stand to the award of J. S. of all matters depending till 29th Jan. &c. *ita quod* &c. and the award recites, that whereas there (\*) were depending the said 29th Jan. divers matters, &c. and he awards de & super præmissis of all matters till the 28th Jan. yet this is a good award, because it does not appear that any matter was depending the said 29th day of Jan. which was not depending before the said 28th Jan. and therefore without special matter shewn, it shall be intended a good award with the said averment de & super præmissis. Tr. 7 Car. B. R. between *Warde and Unwin*, adjudged, which intratur Tr. 6 Car. Rot. 590.]

Submission was made of all matters, &c. 18 Dec. 13 Jac. *ita quod*, the award be made a tor before the 5th Dec. following. They awarded the defendant to pay to the plaintiff 100l. and that the age should release the other all actions and demands, from the 28th Nov. next before; the omitting the two days before the submission was objected to, for that there might be divers controversies between the said time, which are not arbitrated, and consequently that is no award according to the submission, sed non allocatur; for it shall not be intended, unless it had been shewn; but had it been shewn, that any were depending raised in those two days, which were not before, then the arbitrement had been void in toto. Cro. J. 577. 578. pl. 6. Trin. 18 Jac. B. R. *Busfield v. Busfield*. 2 Roll Rep. 193. *Busfield v. Busfield*, S. C. adjournatur.—See (M) pl. 5.

Palm. 109. Pasch. 17 Jac. B. R. in error out of C. B. *Thaire v. Thaire* S. P. and seems to be S. C. adjournatur. [25. If the condition be to stand to the award of J. S. *ita quod* the award be made, signed and delivered by the arbitrators as their deed before such a day, and after the arbitrators make an award, and this is sealed and delivered as their deed, but they did not sign it, the obligor is not bound to perform it, for the signing is a particular thing distinct from the delivery. Mich. 17 Jac. B. per Curiam.]

But *ibid.* 112. S. C. was moved again in Mich. term, and the whole Court agreed, that there ought to be actual signing under their hands, because it was conditional and not general, and judgment accordingly.—2 Roll. Rep. 183. S. C. adjournatur; but S. P. was cited there, and affirmed to have been adjudged accordingly in *Ealing's case*.—*Ibid.* 243. Mich. 20 Jac. the case of *Thaire v. Thaire* was cited by one at the bar to have been adjudged accordingly.

So where the award was delivered to the defendant in writing under their seals, but not under their hands, it was adjudged for the defendant. Palm. 121. Mich. 18 Jac. *Gardenfield v. Lane*.—*Ibid.* cites S. P. adjudged accordingly, in case of *Saltes v. Gillings*.—Bull. 110. Pasch. 9 Jac. *Scott v. Scott*, S. P. adjudged accordingly; and it was agreed per tot. Cur. that if an arbitrator cannot write his name, he ought in such case to set his mark to the award.—2 Mod. 77. Pasch. 22 Car. 2. C. B. *Columbel v. Columbel*, S. P. as to its being under the hand as well as seal, adjudged accordingly.

25. If

26. If two put themselves in arbitrement of all actions real and personal, or of the possession and right, and the arbitrators give their award for one of the parties, or for one thing only, this is a void arbitrement; but Walsh said, that if the parties are bound the one to the other to stand to the award, they are bound to perform the award, though it be void, to save the penalty; quod Brown and Dyer negaverunt, for a void arbitrement is as none, and cited Trin. 22 H. 6. 46. Dal. 43. pl. 27. 4 Eliz. and says, that it was adjudged; Pasch. 24 Eliz. that the condition to perform an award which is void, is void, and that he is not bound to perform it.

Debt by J. H. against J. B. upon an obligation, the defendant said, that actio non, for the condition is, that if the same J. B. and his partners shall stand to the arbitrement and judgment of J. H. of all trespasses and judgments between J. B. W. F. and K. P. and their partners, that then, &c. and said that J. H. awarded, that the said defendant pay 10l. to W. F. which he tendered, and the other refused, and alledged what day, and that he did not make other award, and the plea awarded good; for it may be that there was no cause that any other of the companions of the said W. F. should have any thing, but he was compelled to shew, what day the award was made, and what day he tendered, so that it might appear if there was laches in him or not, for when the award is made, that he shall pay so much, he ought to pay it immediately when no day is limited, and ought to seek the party; quod nota, and see that the obligee and the arbitrator were one and the same person. Br. Conditions, pl. 182. cites 22 E. 4. 25.

28. Memorandum; where men enter into arbitrement, and every one is bound to the other in an obligation or other such covenants, and are obliged to perform it, and it is awarded that each release to the other all actions, &c. there it ought to be expressly all actions before such a day, which shall be before the date of the obligation; for otherwise, the obligations of the award, or the last obligations to perform the covenants, shall be also released, which ought always to be taken care of. Br. Assurances, pl. 4.

Cro. J. 664. pl. 15. Hill. 20 Eliz. in Cam. Scacc. Webb v. Ingram.

Where releases have been awarded, the submission bond shall be intended to be excepted; said by Treby Ch. J. to have been so held. Ld. Raym. Rep. 115, 116.

Award to make general releases till the time of the award is good; because as to mesne acts, between the submission and award, the award is void, and therefore does not exceed the submission; cited Ld. Raym. Rep. 116. as adjudged, Hill. 8 W. 3. B. R. Cooper v. Pierce.—S. P. and it is good for so much as goes to the time of the submission, and void for the residue. 10 Mod. 201. Hill. 12 Ann. B. R. Abraham v. Brandon.

29. Debt upon obligation to stand to the award of J. S. of all controversies between them; J. S. awarded, that the defendant should deliver to the plaintiff 6 Kentish cloths, which were bartered by J. D. for the thread of the plaintiff; it was objected to be out of the submission; the Court said it shall be intended to be in controversy, if the contrary be not shewn, and that they were in the hands of the defendant, and judgment for the plaintiff. Cro. E. 177. pl. 5. Pasch. 32 Eliz. B. R. Vanvivee v. Vanvivee.

30. Award was that one pay to the other 10l. and also to give security to him for the payment thereof; this award, as to the secu-

When an award comprehends that which is submitted and more, it is good for that which is submitted, and void for the residue.

Mo. 686. pl. 948. S. C. and judgment affirmed in error.

Roll. Rep. 20. pl. 24. S. C. but is not S. P.—

An award was to find surety for payment of the sum awarded.

Exception

was taken that it was not good, because the arbitrators cannot compel him to find strangers to be sureties for him; and cited 4 Rep. Samon's Case. But G. Crooke seemed e contra, for that the award is, that he shall find surety by obligation for the sum; the meaning whereof is, *that he shall become bound for it*, and not that he is bound to find sureties. Roll Rep. 270. in case of Lumley v. Hutton.

rity to be given, was held clearly void; but the defendant who is to pay the money, may, by his own assent, give security to pay it, but cannot be enforced by award to do it, and judgment accordingly. 2 Bulst. 260. (but wrong paged 262.) Mich. 12 Jac. Duport v. Wildgoose.

31. A submission was of controversies between the plaintiff and defendant, and his wife, for divers sums of money laid out for the wife at her request, *dum sola fuit*. The award was that the defendant should pay the plaintiff 340l. for all monies laid out by him for the wife, *dum sola fuit*; and all the suits between them should cease. The Court held the award void, it being to pay 340l. for all sums laid out for the feme (omitting the words, viz. at her request) and so is more than was submitted; and so judgment was reversed. Cro. J. 639. pl. 3. Trin. 20 Jac. B. R. Waters v. Bridges.

32. Where there is an *ita quod* in the clause referring to the arbitrators, and the award is made by the umpire, yet the *ita quod* by construction shall relate as well to the umpire as the arbitrators; agreed per Cur. though they for some time doubted thereof. Lev. 139. 143. Mich. 16 Car. 2. B. R. Bean v. Newberry.

[ 48 ] 33. An award was made 8th Feb. *de & super præmissis*, that the defendant within a week after the award, should pay the plaintiff 7l. 10s. in satisfaction of all demands; and that upon payment thereof, each should release to the other all demands; after the submission, and before the award, a new controversy did arise, (viz.) on the 6th Feb. for that the defendant did break and enter the plaintiff's close called B. whereof the arbitrators had notice; after argument, it was resolved, per tot. Cur. that the award was good; and a diversity taken where the award is, in satisfaction of all demands till the award, or a release of all demands till the award, this is ill, but where the award is general, without limitation to what time and made *de & super præmissis*, it shall be intended till the time of the submission, which is good, and judgment for the plaintiff. 3 Lev. 168. Mich. 36 Car. 2. C. B. Robinet v. Cobb.

An award to release all matters to the time of the award, has been held good for

34. Submission of all matters to the time of the award; the award was made in October, that one of the parties should release all actions in December following, per Cur. 'tis good, unless it should be shewn, that some new cause of action intervened. Comb. 156. Short v. Maynard.

a long time, (though anciently otherwise) because it shall not be intended, unless the contrary be shewn, that any other matter arose, between the submission and making the award, and if no matter did arise, the arbitrator has awarded no more than he should do; and since that a second reason has been added, that supposing other matters to have arisen, yet as to that, the award is void; the general words being to be expounded of all matters in controversy at the time of the submission, and as to other matters arising since, to be void; and if in such case, the party submitting to the award, should make a release to the time of the submission, it would be a good performance of the award. Jud. pro Quer. 12 Med. 116. 117. Hill. 8 W. 3. Hooper v. Pierce.

35. Award was that the defendant pay 10l. in full of all demands, and that the plaintiff release to him, &c. The Court held, that if the plaintiff would not receive the 10l. because he would not be obliged to release when the defendant tendered, and he refused, he was as much obliged to release upon the tender and refusal, as if he had actually received the money. 1 Salk. 74, 75. pl. 14. Trin. 2 Annæ, B. R. Simon v. Gavil.

35. The arbitrators awarded the bonds of submission to be surrendered. It was objected that this exceeded their authority; and Holt Ch. J. held it void; for they could not award any thing concerning them. Ld. Raym. Rep. 553. Hill. 11 W. 3. Doyley v. Burton.

36. Where the submission is special of all controversies between the plaintiff and defendant as administrators, &c. and the award is, that they should execute mutual general releases according to the extent of the submission; it was held by Holt Ch. J. that the special words of the submission explain the generality of the award. Ld. Raym. Rep. 533, 534. Hill. 11 W. 3. Doyley v. Burton.

37. Submission was of all actions, &c. between the plaintiff and defendant. In debt on the bond, the defendant pleaded no award, the plaintiff replied, and set forth an award of all actions between the plaintiff and defendant and his wife, and that defendant pay the plaintiff 20l. in satisfaction of law-charges due to him by the defendant's wife, as executrix of, &c. It was moved in arrest of judgment, that the submission should have been of all actions between the plaintiff and the defendant and his wife; but it was held that it was good as it is, because upon the defendant's inter-marriage with his wife, who was the widow and executrix of her former husband, the plaintiff had an immediate demand on him; and the Court being of that opinion, held the award good, and so the judgment was affirmed. 8 Mod. 212. Hill. 10 Geo. Morfe v. Sury.

## (C) Of what Things they may make an Award. [ 49 ] [Pursuant to the Submission.]

[1.] If the submission be of all actions, they cannot make an award of such things of which the parties have cause of action. 36 H. 6. 11. b.]

[2. But otherwise it is where the submission is of all actions and quarrels. 36 H. 6. 11. b.]

personal, they cannot make an award of a servant taken, unless action be thereof pending; per Priost, but Moyl e contra.

Br. Arbitrement, pl. 50. cites S. C. and is, that if a man submits himself of all actions

[3. If a submission be of all actions between them, and the award is to make a release of all actions till the day of the award, which is after the submission, this is a void award because the time between the submission and the award is not submitted. My Reports 14 Jac. Vanlore and Tribb 29. adjudged. Co. 10. Moor and Beedle. 132. adjudged.]

See (B) pl. 4. & 21. S. C. and (N) pl. 1. S. C.

[4. They may make an award of a thing which depends upon the principal.]

Br. Arbitrement, pl. 18. cites S. C. & S. P. accordingly, by Newton, but Chantour e contra.

[5. As if two submit all trespasses, and the arbitrator makes an award, and awards further that the parties put their seals to the award, they are bound thereby to put their seals to the award, for this depends upon the principal. Dubitatur 8 H. 6. 18. b.]

[6. So if the submission be of all trespasses, and the award is that one shall pay 10l. to the other, and that he shall enter into an obligation to him for it, this is good, and he ought to enter into the obligation, because this makes the award effectual. 8 H. 6. 18. b.]

[7. Upon a submission of an action, if the award be in part, that the one party shall be at such a place with his counsel to bear the award, this is void, because this is out of the submission. 19 H. 6. 36 b.]

A controversy for land was submitted, and the award was to pay rent. It was objected that this was not within the

[8. If the submission be of a term for years of land, and of all thereupon depending, and the award is that one shall pay to the other 10l. for the rent that shall become due on this term at Michaelmas next ensuing, this is no good award, for the rent is not within the submission, inasmuch as the rent may be extinct by surrender, eviction, &c. before Michaelmas. M. 10 Jac. B. R. between Gray and Wicker, adjudged.]

submission; to which it was answered, that as to the payment of the rent, though it be a future act, yet being matter of satisfaction it is good, though not expressed in the submission. But Roll Ch. J. said that the words (super premissis) bring the payment of the rent within the submission, otherwise the awarding the payment thereof would not be good by way of satisfaction; but here the controversy is for the land, for which the rent is to be paid, and the matter does not appear to be out of the submission, and it is not necessary to aver that the land was in controversy. Sty. 306. 307. Mich. 1651. Barnard v. King.

An award made 23 June ordered 20l. rent, which by the award itself appeared not to be due till the 24th, to be paid by A. to B. in satisfaction of 6l. which the arbitrators did judge to be owing to B. This was held to be void by Parker Ch. J. who delivered the opinion of the Court, and cited this case in Roll as an express authority, and said that the reason is plain, viz. because the rent may become extinct, either by surrender or eviction before it is due. 10 Mod. 204. Hill. 12 Annæ, B. R. Barnardiston v. Fowler. See (B) pl. 3. S. C. & S. P.

[ 50 ] 9. Where 2 men for variance of the manor of D. put themselves in arbitrement of 2 of this, and of all actions and demands, and it is awarded that he shall make partition of the manor, and that the one deliver to the other a deed of annuity, which the other claims in jure uxoris, this is a good award, though the manor between the parties was the principal cause, and this by reason of these words, all demands; for where he claims the deed of another in jure uxoris, this is a demand. Quod nota. Br. Arbitrement, pl. 22. cites 21 H. 6. 18.

10. Award was, that R. the defendant should have the land, yielding and paying 10l. a year, and that T. the plaintiff, in further assurance, should levy a fine to R. and that R. should grant and render to T. The words (yielding and paying) do not make a condition, because it is not knit to the land by the owner himself, but by a stranger, viz. the arbitrator; but it is a good clause to make the same an article in the award, which the parties are bound to perform on pain of forfeiture of the recognizance; which Wray confessit,



cessit, and that this rent shall not cease by eviction of the land.

3 Le. 58. pl. 86. Mich. 17 Eliz. B. R. Tresham v. Robins.

11. Submission was of all debts, trespasses, and injuries. The award was for the defendant to pay, &c. and to release all actions, debts, duties, trespasses, and demands. It was objected, that the words (duties and demands) extend further than the words in the submission, and so the award exceeds the submission, and therefore void. Doderidge and Whitlock J. held the award well made, and according to the submission. Jones J. thought the award more large than the submission. But the breach being assigned in the non-payment of the money according to the award, the whole Court agreed that this is within the submission, and so good, and judgment for the plaintiff. 3 Bulst. 311. Mich. 1 Car. in B. R. Cable v. Rogers.

A submission was of all debts, sums of money, claims and demands, &c. The award was, that the plaintiff release to the defendant all bonds, specialties, judgments, executions, and extents.

It was objected that this exceeds the submission; sed non allocatur; for debts, sums of money, and demands, whether due by bond, judgment, execution, or extent, are within the submission, and consequently the arbitrators may award a release of them. 2 Saund. 188. 190. Mich. 22 Car. 2. Roberts v. Mariet. — 2 Saund. 73. S. C. but S. P. does not appear. — Lev. 300. S. C. but not S. P. — Mod. 42. pl. 95. S. C. but S. P. does not appear. — Ibid. 290. S. C. & S. P. seems to be touched as

12. Upon a submission to stand to the award, touching all matters in difference between the parties, the award was that they make general releases to each other of all demands. Upon error brought it was insisted, that the word (demands) is of a larger signification than the word (differences.) But Roll Ch. J. answered, That if the release be more large in words, yet it is good enough; for it shall be intended only of all matters in debate between the parties, and the Court will not intend other matters, unless shewn in pleading; and to this the judges agreed, and judgment for the plaintiff, Nisi &c. Sty. 170. Mich. 1649. White v. Holford.

13. An award ordered 8l. to be paid for charges and expenses. Exception was taken, that this was not submitted by the parties, and so no award ought to be made of them. But Roll Ch. J. held that it was within the submission, because the arbitrators have power to allow charges; and afterwards Glyn Ch. J. held accordingly. Sty. 459. Trin. 1655. Dod v. Herbert.

14. Where the submission is general and conditional to end all controversies, an indictment for a barrettry is not a controversy between the parties within the meaning of the submission; for that is the king's suit, and if the arbitrators award the ceasing of such a prosecution, it would be void, because it would be to obstruct justice. Resolved. Freem. Rep. 204. pl. 208. Mich. 1675. Horton v. Benson.

## (D) What Things shall be said to be submitted. [ 51 ]

1. IF the baron and feme are possessed of a term in the right of the feme, as executrix of her first husband, and a stranger pretending title thereto, and the baron by writing submits to an award for the interest and title of the lease, and the arbitrator

\* Fol. 246. *awards one part to the pretender, and the other \* moiety to the baron and feme, the feme, after the death of the baron, shall be bound by this award. D. 2 Eliz. 183. 57. Quære.]*

Cro. J. 447. pt. 27. S.C. adjudged, tho' being due in right of his wife as administratrix is in another's right, and says, that [2. If a *feme* be indebted to J. S. in a certain sum, as administratrix to J. D. and she takes husband, and the husband and J. S. submit all matters between them to the award of W. N. he may make an award of this debt, which is due by the husband and wife, though it be due in the right of his wife, and as administratrix; for he is now chargeable by the inter-marriage. H. 15 Jac. B. R. between *Lumley and Hutton*, adjudged upon a demurrer. M. 13. Jac. B. R. the same Case.]

so it was adjudged here in 12 Jac. in Case of *Vanlore v. Dribblet*.—Roll Rep. 269. S. C. and Coke Ch. J. said, that in this case, tho' no assets come to the hands of the baron, yet he is chargeable for devastavit made by the wife before coverture, whence the reporter infers that he inclined that this submission extends to this debt.

S. C. cited Arg. Roll Rep. 269. —Bridgm. per Curiam.] [3. So upon such a submission the arbitrator may make an award of a debt due to a *feme* as executrix. 21 H. 7. 29. b. per Curiam.] 91. Arg. cites S. C.

If an award be made between A. and B. that all suits &c. between A. and B. [4. If A. and B. submit to the award of J. S. of all suits and actions depending between them two, the arbitrator cannot make an award of an action which B. and his wife have depending against A. for this is out of the submission. H. 38 El. Br. between *Brockas and Sir J. Savage*, adjudged.]

should cease, it could neither be the intention of the arbitrators that their award, nor of the parties that their submission should extend to suits between A. and B. and others; and the law is plain that the prosecution of a suit between A. and B. and others, is no breach of the award, be the intention of the parties what it will; per Parker Ch. J. 10 Mod. 204, 205. Hill. 12 Ann. B. R. *BARNARDISTON v. FOULYER*, and he cited the principal case here of *Brockas v. Savage* as a much stronger case; because husband and wife are to many purposes in law considered as one person.

Note, by 3 justices for law in the Exchequer Chamber, that if J. N. and three others put themselves [5. If A. and B. of the one part, and C. of the other part, submit themselves to the award of J. S. of all the matters between them, J. S. may make an award of any matter between A. only and C. though B. hath nothing to do therewith; for the submission shall be taken distributively. Mich. 9 Car. B. R. between *Arauld and Pale*, adjudged upon a demurrer.]

in the award of W. P. of all actions and demands between them, that in those cases the arbitrator has good authority to make award of all joint matters between them, and of all several matters also, and of every matter between the three and the fourth, and if he makes award that one of the three shall give something to the fourth, and that the others shall be quit, and he finds that the fourth owes to one of the three 20s. which he awards that he shall pay him, and if he owes nothing to the other two, he awards that he shall be quit against them, this is a good award. Br. Arbitrement, pl. 44. cites 2 R. 3. 18.

But it seems clear, that they have not authority to determine in arbitrement matters between the three; for they are one party against the fourth, but he may determine between any of the three and the fourth; Quod Nota. Ibid.

If arbitrement be of all causes between A. B. and C. this operates distributively. Roll Rep. 298. Arg. cites 2 R. 3. 18.—If A. and B. of the one part, and C. of the other part, [ 52 ] put themselves in arbitrement to J. S. by this submission J. S. may arbitrate any causes between A. and B. of the one part, as well as between them and C. because the intention of the parties by their submission was to have peace and quiet. Yelv. 203. per Cur. cites 2 R. 3. 18. b.—Brownl. 112. cites S. C. but it is only a translation of Yelv.—S. P. accordingly, 8 Rep. 98. in *Baspole's Case*.—Bridgm. 91. Arg. cites S. C.—S. C. cited by Houghton J. 3 Rult. 65. as held by Hussy, Fairfax, and Catesby J. in the Exchequer Chamber; and says, it is a good

good case, and if an award be made for any of the three it is sufficient; for this being an case of an arbitrement, which by intendment of law is to make peace and put a perfect end to controversies in question, a reasonable construction is to be made.—Submission, by rule of Court was, of all matters in difference between A. of the one part, and B. and C. of the other part, (without saying between them and either of them) an award that C. should pay so much due by him to A. is good; for such submission imports all matters that either had against the other jointly or severally. Comyns's Rep. 547. pl. 225. Pasch. 9 Geo. 2. C. B. Athelstone v. Moore and Willis.—If A. and B. of the one part, and C. on the other part submit to arbitration, the arbitrators may make an award not only of matters in difference between A. and B. jointly, or A. and B. separately, and C. but also of matters between A. and B. Vern. 259. pl. 252. Mich. 1684. Carter v. Carter.—See (O) pl. 8.

[6. If a submission be of *all actions personal, sedis & querelis*, the arbitrator cannot make an award of any suit, action, or quarrel which is real, but only of such which are personal; for the word (*personal*) refers to all which comes after in the copulative. \* 9 E. 4. 43. b.]

[7. But if the submission had been of *all actions personal, ac sedis & querelis*, the arbitrator might have made an award of real things; for the word (*ac*) disjoins them. 9 E. 4. 44. per Choke.]

[8. If there be a controversy between the parson and parishioners, whether tythes should be paid in specie or not, and they reciting the said controversy submit themselves to the award of J. S. for all matters, as well spiritual as temporal, from the beginning of the world to the present day; and the arbitrator awards that the parson shall have 7l. for the tythes due before the submission, and that the parishioners shall pay 4l. per annum for the tythes that shall grow due after, this is a good award for the tythes which shall grow due after the award; for the right of the tythes was in question, and not the possession, and so the right of them was submitted to the award. H. 42 El. B. R. 8. between Beckingham and Hunter, adjudged.]

[9. If A. and B. submit themselves to the award of J. S. touching a suit depending between them in an *ejectione firmæ*, J. S. upon this submission cannot make an award of the land for which the action is brought. P. 10 Car. B. R. between Taylor and Walsam, adjudged in arrest of judgment, in an action upon the case for non-performance of this award, after a verdict for the plaintiff.]

10. Within a submission of *all actions* to arbitrement causes of actions are not contained. Co. Litt. 285. a. (k)

¶

(E) What shall be a good Award. Where the Award is to do a Thing out of the Submission to a Stranger, or by a Stranger, [And who shall be said a Stranger.]

Fol. 247.

[1. UPON a general submission, if the award be, that the one shall pay so much to the other at a certain day, and that one J. S. a stranger shall enter into an obligation to pay it &c. this is void, because it is out of the submission, for he cannot by intendment procure J. S. to do it. Co. 10. Moor and Beadle 131. b. adjudged.]

See (B) pl. 5. S. C. and the notes there.— See infra pl. 4. in the notes.— See (F) pl.

(F) pl. 2.—See (N) pl. 7.—Brownl. 66. Mich. 16 Jac. Gates v. Smith S. P. there was a demurrer, because it was out of the submission, and was not in the defendant's power to perform it.

[ 53 ] [2. If an award be, that one *shall* pay so much to the other at the house of J. S. this is good, for he may come to the house without entering the house, and so he shall be no trespasser. My Reports, 10 Jac. between \* *Lynsey and Ashton*. Curia. Pasch. 12 Jac. B. R. the same case adjudged. Pasch. 13 Jac. in scaccario upon a writ of error adjudged in the same case. Mich. 22 Car. B. R. between † *Linnen and Williamjon* adjudged upon demurrer. Intratur Pasch. 22 Car. Rot. 101. and this was after affirmed upon a writ of error in parliament. Trin. 24 Car. B. R. between † *Wickerd and Langly* adjudged upon demurrer. Intratur Hill. 23 Car. Rot. 792.]

afterwards affirmed in the Exchequer Chamber.—*Sty. 112.* Roll Ch. J. cites S. P. to be adjudged in 22 Jac. and seems to intend S. C. that an arbitrement to do a thing in or at the house of a stranger is well enough, for it may be intended to be done at the house without doing a trespass, though not in the house unless the contrary be shewn by the party.

† S. C. cited by Roll Ch. J. Sty. 112.

† Sty. 110. Trin. 24 Car. Langly v. Wybord, S. C. but S. P. does not appear.

Debt on bond for performing an award. Defendant pleaded no award; plaintiff replied, and set forth an award that defendant should pay so much to the plaintiff in or at the dwelling-house of J. S. in B. Adjudged on demurrer for the plaintiff, for tho' J. S. is a stranger, yet defendant may go to the door of the house, and pay it there without being a trespasser, if J. S. will not permit him to pay it in the house. 3 Lev. 123. Mich. 35 Car. 2. C. B. Holland v. Helwis.

Cro. C. 226.  
pl. 3. 3. C.  
and the award was, that defendant pay 3d. on such a day at the

[3. But it seems, that if the owner of the house has lands adjoining to the house, so that he cannot come to the house without doing a trespass, that this is a void award, for the arbitrator cannot subject him to an action of trespass. Mich. 7 Car. B. R. between *Taverner* and *Skingley* adjudged per Curiam upon demurrer.]

S. in C. being the sign of the Cock; and all the Court agreed the award to be good; for the appointing the payment at a stranger's house (especially it being by intendment a common inn) cannot be unreasonable, or shall make an unlawful act, but by intendment the plaintiff will procure that the money may be paid there, but if he cannot, it may peradventure excuse the defendant; but the award of itself prima facie is good enough; and so adjudged for the plaintiff. — See (F) pl. 10.

Br. Conditions, pl. 59, cites S. C. & S. P. but

if the party be bound to stand to the award, it ought to be performed; otherwise not; note the diversity. — S. P. but per tot. Cur. notwithstanding that the award is void, yet he ought to perform it by reason of the obligation; for otherwise the bond is forfeited, but action of debt upon the award does not lie, because the award is void, by which the plaintiff traversed the award, but Brook says, quod mittimus! for this is no award between the plaintiff and defendant. Br. Arbitrement, pl. 24. cites 22 H. 6. 46. — S. C. cited 10 Rep. 121. b. says the case is good law but ill reported, and that the exception taken by Ashton to the plea that because it appears that the arbitrement is void, the obligation remains in force, is a non sequitur; for if no arbitrement, or a void arbitrement is made, which is all one in law, the bond is not forfeited, nor shall the obligee take any benefit of it, and so all that follows there, (as Ld. Coke thinks) is a mistake of the reporter, it not being pertinent to the case in question. — A. and B. were mutually bound to stand to the award of M. who awarded that A. with three sureties, should be bound to B. to pay a certain sum; this was adjudged a void award; for the arbitrator had no authority to award any thing concerning a 3d person, but in that case it was said, that if the award had been to pay 1cl. to J. S. or that the party shall be nonsuited or discontinue his action the award had been good, because they are acts to be done.

done by the party himself, and if he tenders the 10l. to J. S. and he refuses, or if he offers to be nonsuited, or to discontinue the action, and the Court refuses, the obligation is saved, but that he ought to plead tender of payment and offer to be nonsuited &c. Cro. E. 4. cites it as adjudged Mich. 18 & 19 Eliz. Norwich v. Norwich.—3 Le. 62 pl. 91. S. C. the Court held, that if he tenders his own obligation it is sufficient, and agreed accordingly as to the other points.—See (B) pl. 5. and the notes there, and (B) pl. 6. S. C.—See (E) pl. 1. 4.—See (N) pl. 7.

[5. It seems that it is to be intended that this payment could not be any advantage to the other, for no advantage to the other appeared, and so Doderidge inclined. P. 16 Jac. B. R. in Buckhurst and Mayo's Case.]

The arbitrators awarded 10l. to be paid to that the said [ 54 ]

a stranger, and for that reason it was adjudged against the plaintiff, tho' the truth was, that the said stranger was an attorney to the plaintiff, and he recovered it for his master by the intent of the arbitrators, yet because it was not recited expressly in the award that he was to have the 10l. for his master it was held insufficient. D. 242. b. Marg. pl. 52. cites Trin. 3 Jac. B. R. Futrel v. White.

[6. If J. S. and J. D. are bound in 20l. at my request, and the request of W. N. and after there is a controversy between us two, which of us shall pay this money among other such bargains between us, upon which all matters in controversy are submitted to arbitrement, and the arbitrator awards that I shall pay one moiety of the money with the use, and W. N. the other moiety to the obligee, this is a good award, though he be a stranger to whom it is to be paid by those who submitted themselves, for here appears to be an advantage to the parties. Pasch. 16 Jac. B. R. between Gray and Gray, per Curiam.]

not appear.—See (Q) pl. 2. S. C.

[7. An award that one of the parties shall surrender his copyhold into the hands of 2 of the tenants of the manor who shall present it, it is a good award, though this is to be done to strangers who are not compellable, because they are to be used but as instruments. Mich. 13 Jac. B. between Cote and Pooley, per Curiam.]

[8. So it is a good award that one of the parties shall make a deed of feoffment with a letter of attorney to J. S. to make livery, for there J. S. is to be used but as an instrument. Mich. 13 Jac. B. per Curiam.]

[9. If there be a controversy concerning certain lands, between A. B. and C. and thereupon A. of the one part, and B. and C. of the other part submit to the award of J. S. and thereupon A. binds himself to an obligation of 1000l. to B. and C. with condition to perform the said award of J. S. touching this, and B. and C. because they would not be bound the one for the other, enter into several obligations of 1000l. each to A. with several conditions for the performance of the award of the said J. S. and the arbitrators award that A. shall make a release of all (\*) his right in the land to B. and C. and in consideration thereof B. and C. should pay 300l. to A. In an action of debt by A. against B. upon his obligation for non-performance of the award, and breach assigned that neither B. nor C. paid the 300l. at the time appointed according to the award, this is a good award, all this matter being disclosed in pleading; for upon all the matter shewn it appears that C. is no stranger to the award; for he and B. submitted themselves

Cro. c. 433. pl. 3. S. C. resolved that it is but as one submission by several bonds, the bonds being both

\* Fol. 248.

entered into at the same time.

selves jointly, and tho' they entered into several obligations, yet this did not make C. any stranger to the award. Hill. 11 Car. B. R. between *Haies and Haies*, adjudged upon a demurrer. Intratur Hill. 10 Car. Rot. 1045.]

See pl. 19.

[10. If a submission be touching a title of land between A. and B. and the arbitrators award that A. and his wife, and son and heir apparent, by the procurement of A. shall pass such assurance of the land to B. as B. shall requirz, this is a void award as to the wife and son, because they are strangers to the award. P. 13 Car. B. R. between *Barney and Faierchild*, adjudged per Curiam, in arrest of judgment.]

Cra. C. 141.  
pl. 3. Brad-

[ 55 ]

sey v. Cly-  
ston, S. C.  
The Court  
held that he  
might well  
acquit him,  
if the mo-  
ney be pay-  
able at a  
future day,  
as it is here

[11. If there be an award, that one shall acquit the other of an obligation of 200l. in which they both are bound to B. for payment of 105l. this is a good award; for tho' he cannot compel B. being a stranger, to deliver up the obligation, or to make a release by the common law, yet if the obligation was not forfeited, he might pay the 105l. to B. at the day, and this would acquit the other; and if the obligation was forfeited, yet he might pay the penalty to B. and so acquit the other; or he might, upon satisfaction given, compel B. in a Court of Equity to deliver up the obligation, or to make a release. P. 15 Car. B. R. between *Barsey and Cliphsham*, adjudged upon a demurrer. Intratur Tr. 14 Car. Rot. 161.]

to be intended that it was, and judgment for the plaintiff.—Jo. 431. pl. 4. *Bardy v. Clifton*, S. C. accordingly.—Mar. 18. pl. 42. S. P. and seems to be S. C. held accordingly. And *Jones J.* said, that tho' the bond were forfeited, he might upon payment compel the obligee, by subpoena in Chancery, to deliver up the bond; or that he suffer an action to be brought against him, and then to discharge and pay it.—S. C. cited Mod. 9. pl. 28. Mich. 21 Car. 2. B. R. in *Case of Becket v. Taylor*, which was an award, that one of the parties should discharge the other from his undertaking to pay a debt to a 3d person, who was no party to the submission; and therefore it was objected that he was not compellable to give a discharge; but it was answered that he is compellable; for in case the debt be paid him; he is compellable in equity to give a release to him that had undertaken to pay it.

12. If a man impleads another by action, and the arbitrator awards that the party who has submitted himself, and who is a stranger to the action, shall make the defendant in the action, who is a stranger to the submission, to confess the action of the plaintiff, this is a void award. Quod nota. Br. Arbitrement, pl. 39. cites 17 E. 4. 5.

Mo. 3. pl.  
11. S. C.  
accordingly.

13. The submission was of the right, title, and possession of certain lands in controversy between the parties. In such case the arbitrators cannot award that the obligor shall cause the lord of the manor, of whom the land is holden, to grant it by copy to the obligee, or that he cause a stranger to make a release of all his right therein to the obligee; per Baldwin Ch. J. of C. B. Bendl. 29. pl. 44. Mich. 34 H. 8. Anon.

D. 216. b.  
217. 2. pl.  
58.60. S.C.  
says it is not  
shown in all  
the pleadings  
that B. had  
any interest  
in the said  
church or

14. A. and B. submitted matter of dilapidations, and all actions, suits, &c. The dilapidations were of parsonage barns &c. where Y. was late parson, and M. the present. The award recited, that he (the arbitrator) being indifferently elected between B. in the name and for the behalf of M. now parson &c. and A. executor of Y. late parson &c. did award that A. should do such and such repairs, and then that B. should indemnify him against M. &c. The Court

Court held this award void; and because it was contrary to the submission, judgment was awarded that the plaintiff nil capiat &c. Bendl. 107. pl. 146. Mich. 3 & 4 Eliz. Browne v. Mercerell.

*parsonage, by patronage or lease, and therefore is to be looked upon*

as a stranger to the matter of the award, &c. And Weston held the words (in the name and for the behalf of M.) void. — Bendl. 110. Marg. says that judgment was not entered, because the parties agreed.

15. The award was, that one of the parties to the submission should pay J. N. a stranger 20s. But it was held that this was void, and the arbitrators cannot award a man to do what is not in his power; for it is in the election of J. N. whether he will receive the money or not. Godb. 12. 13. pl. 18. Pasch. 24 Eliz. C. B. Anon.

16. Two submit to an award, which was, that one shall cease all suits, and that he shall procure J. N. to be bound with a stranger to the submission, and to make a feoffment &c. of his manor of D: all which was out of the submission. Now in this case the first thing only is good, viz. to cease all suits; the 2d is against the law, and the 3d out of the submission; yet the award being good in part, ought to be performed in that, or otherwise the bond is forfeited. Godb. 256. pl. 352. Pasch. 12 Jac. B. R. obiter.

17. There being a controversy between a parson and his parishioners about tithes &c. six of the parishioners were bound that they and all the parishioners should perform the award. An award was made, and Harvey thought it good, tho' all the parishioners had not submitted to it, because these six were bound for them; and cited 18 E. 4. 22. and 19. 1. and in the next term judgment was given for the plaintiff accordingly. Litt. Rep. 30. Pasch. 3 Car. C. B. Mudy v. Ofam.

Het. 4. Mady v. Ofam. [ 56 ] S. C. and seems to be only a bad translation of Litt. Rep.

18. Award, that the father and son should release all their right, was held void, because the son was no party to the submission. Hardr. 46. Arg. cites Trin. 5 Car. B. R. Humphrey v. Ladd.

See pl. 10.

19. A controversy arose by reason of the wife, which was submitted to arbitration. The husband only was bound to the submission, and the award was to pay to the husband and wife 10l. and good; for the controversy arising by reason of the wife, the award was within the submission, and judgment affirmed. Mar. 77. pl. 122. Trin. 16 Car. C. B. Anon.

Money awarded to be paid to the baron and feme, where the feme was no party to the submission,

was held good; for by Roll Ch. J. the baron may submit for his wife. Sty. 351. Mich. 1652. Smith v. Ward.

20. Upon a submission of all actions, matters, &c. Part of the award was, that a submission should be made before the mayor of T. and three others. It was objected that the defendant cannot compel any to come before the mayor, &c. because they are strangers, and so the award void. But Bridgman Ch. J. and Tirrel J. held it good, if it had been to be made before the mayor only, though he be a stranger to the award, [and so seem to admit it not good, being to be made before him and three others;] but Hide J. held it void as to doing it before the mayor only. Sid. 12. pl. 9. Mich. 12 Car. 2. B. R. Spigurnel v. Jones.

21. Award

(E. 2) What *Things* may be awarded to be done?  
A Thing *impossible*.

\* Br. Arbitrement, in pl. 39. cites 19 E. 4. 1. S. P. by Brian and Choke. [1.] If they award a thing \* impossible, it is void; as to make an obligation to another immediately after the award, this is void; for a space is requisite. 18 E. 4. 21.]

Br. Arbitrement, pl. 39. cites S. C. and says that it is a good award; per Nele J. which Choke J. agreed; and Brooke says the reason seems to be, for that he may acquire so much after. — Br. Arbitrement, pl. 52. cites 5 H. 7. 23 S. C. & S. P. — Ibid. pl. 31. cites S. C. & S. P. [2. But otherwise it is, if he awards that one shall make a feoffment to the other of one acre, and shall immediately deliver the charters, this is good, so that he shall make an obligation, and immediately after pay the money; for it is possible. 18 E. 4. 21. But an award to pay 20l. where he hath not 20d. or to pay 20 tun of wine, where he hath not one, is no good award. 19 E. 4. 1.]

(F) Impossible. Unreasonable.

S. P. by Roll Ch. J. Str. 152. cites 7 E. 4. 14. [1.] If it be awarded, that he shall procure a stranger to do a thing, and he hath no means by law to compel the stranger to do it, the award is void; but if he has any means to compel the stranger to do it, either by the common law or in Chancery, he is bound hereby. 17 E. 4. 5. b. per Curiam. 21 E. 4. 75.]

\* Br. Arbitrement, in pl. 39. cites 18 E. 4. 22. 23. [2. So an award that he shall be bound with sureties, is void as to the sureties. \* 18 E. 4. 23. † 19 E. 4. 1. But the party himself may be awarded to pay any thing, tho' he hath it not. 28 E. 4. 1.]

† Br. Arbitrement, in pl. 39. cites S. C. & S. P. — S. P. For though a man may bind himself by obligation upon condition to cause a stranger to infeof the obligee, this is his folly; but an arbitrator is a judge intended to be indifferent, and therefore he shall not award that a man shall do a thing which does not lie in his power; for he has no means to compel the stranger to be bound. Br. Arbitrement, pl. 39. cites 17 E. 4. 5. — See (N) pl. 7.

\* Br. Arbitrement, pl. 52. cites 5 H. 7. 23. S. C. & S. P. Ibid. pl. 31. cites S. C. & S. P. [3. If the award be, that he shall levy a fine before the justices de Banco, before such a day, it is good, though this cannot be done without the act of the Court. 19 E. 4. 1. \* 5 H. 7. 22. b.]

{ Fol. 249. [4. But if the award be, that one shall command the justices de Banco to make him to levy a fine before a certain day, this is void, because it is not in his power. 19 E. 4. 1.]

Fitz. Arbitrement, pl. 27. cites S. C. — Br. Ar. [5. If an award be, that each of the parties shall discontinue the action which they have one against the other, (admitting this is good, though it is not final) this is a good award, tho' here an



an act is to be done by the Court; for the default of the defendant, and the denier of the action, is the act of the party. 5 H. 7. 22 Curia.]

birement,  
pl. 31. cites  
S. C.—  
Ibid. pl. 52.  
cites 5 H. 7.

23. S. C. & S. P.—An award was, that the plaintiff should not prosecute, nor proceed in such an action in the same term. The Court held this to be a good award; and agreed that the entry of continuance from term to term is not any breach. Cro. J. 525. pl. 12. Hill. 16 Jac. B. R. Gray v. Gray.—Godb. 275. pl. 389. S. C. but nothing said by the Court.—2 Roll. Rep. 62. S. C. & S. P. per Cur. For he that continues a thing does not prosecute or proceed in the said thing, quia contrarium in se, and so no breach assigned. [ 59 ]

[6. The same law is of a nonsuit, (admitting ut supra.) Dubitatur 5 H. 7. 22. b.]

Br. Arbitre-  
ment, pl. 31.  
cites S. C.

& S. P. It was at first held otherwise, but afterwards they thought such award good.—Ibid. pl. 52. cites 5 H. 7. 23. S. C. and S. P. that such award is good.—Fitzh. Arbitrement, pl. 17. cites 5. C.

[7. So it is a good award, that the defendant shall make default in a præcipe quod reddat, and the plaintiff shall make a retraxit, though this to be done by the Court as well as the party. 5 H. 7. 22. b.]

Br. Arbitre-  
ment, pl. 31.  
cites S. C.  
& S. P. ac-  
cordingly,

and so it is that the plaintiff shall make a retraxit.—Ibid. pl. 52. cites S. C. but S. P. does not appear.—Fitzh. Arbitrement, pl. 17. cites 5. C. & S. P. accordingly.

[8. It is a good award that one shall pay 10l. to a stranger, &c. though he cannot compel him to accept thereof. \* 5 H. 722. b. (it is to be intended that there is benefit to the other party) Pasch. 16 Jac. B. R. between † Gray and Gray per Curiam.]

\* Br. Arbitre-  
ment, pl.  
31. cites  
S. C. & S. P.  
—Ibid. pl.  
52. cites  
notes there.

S. C. & S. P.—† See (E) pl. 6. S. C. and the

[9. It is a good award that one shall enfeoff a stranger of certain lands, though he cannot compel the stranger to accept thereof. 5 Hen. 7. 22. b.]

Br. Arbitre-  
ment, pl. 31.  
cites S. C.  
& S. P.  
Fitzh. Ar-

birement, pl. 17. cites S. C. & S. P. accordingly, and that he may do it without the stranger's agreement.

[10. It is a good award that one shall pay 15l. to the other, apud domum J. S. a stranger, for he is not bound to pay it in the house of J. S. but as near as he may, and then he shall not be any trespasser. Pasch. 13 Jac. B. R. Ashton's Case, in Camera Scaccarii adjudged.]

(E) pl. 2.  
S. C. See  
(E) pl. 3.  
and the  
notes.

[11. If A. & B. merchants of a ship on the one part, and C. & D. part-owners with all other part-owners, and mariners of the ship on the other part, submit to the award of J. S. of all matters concerning a prize taken, by way of reprisal, and A. & B. enter into an obligation, and C. & D. into another obligation to perform the award, and J. S. awards that A. and B. the merchants, shall pay 1000l. to C. and D. for the use of them, and the residue of the part-owners and mariners; this is a good award, for if A. and B. do not pay the money, the part-owners and mariners may have an action of debt against them, in as much as all have submitted to the award, and if they pay the money to C. and D. to the use of them, and the residue of the part-

Sty. 133. S.  
C. adjorna-  
tur. 136. ad-  
journatur 152.  
adjudged for  
the plaintiff  
nisi &c.

owners and mariners, though it be not divided how much each one shall have, yet in as much as they have jointly submitted, it may be jointly awarded to be paid to them; and tho' it be to be paid to C. and D. for the use of them, and the residue of the part-owners and mariners, and it was objected, that the residue of the part-owners and mariners had no remedy for their part, but by action, yet this is a good award, for it is a good award to award that one shall enter into an obligation to pay a sum, which is but a thing in action, and the *rest of the part-owners and mariners may have remedy, at least in Chancery, against C. and D. if not at common law.* Mich. 24 Car. B. R. between *Wood and others plaintiffs, and Thompson and Clement defendants,* adjudged upon demurrer. Hill. 22 Car. Rot. 803.]

Het. 4. Mudy v. Ofam, S. C. but is only an ill translation of Palm.

12. Upon a submission between the parson and parishioners, as to tithes &c. the award was, that when the parishioners clip the sheep, they should give notice to the parson, so that he or his servants may be there. Hutton J. thought it unreasonable for the parishioners to be seeking every where after the parson; but Crooke J. held it good, and that the parson is always resident on the parsonage, and judgment was given accordingly for the plaintiff. Palm. 30. Pasch. 3 Car. C. B. Mudy v. Ofam.

13. Award to pay 450l. to an infant, and that guardian shall give bond that infant at his full age convey the lands in question, was set aside because unreasonable; per Finch C. 1 Chan. Cases, 280. Trin. 28 Car. 2. Cavendish's Case.

14. A. and B. were partners. A. in behalf of himself and partner, referred all differences &c. between them and the plaintiff to J. S. and promised to perform his award; J. S. awarded, that all suits prosecuted by the plaintiff against the defendant should cease, and that he pay the plaintiff &c. Exception was taken, because the submission was only of matters concerning the partnership, whereas the award is, that all suits shall cease; and also that it was of all suits between the plaintiff and partner, and the award is, that all suits prosecuted against the defendant only shall cease; and likewise that B. the other partner is no party to the submission. Sed non allocatur; for no difference shall be intended, but what concerned the plaintiff and defendant, as the defendant was concerned with B. in trade only, unless the contrary appears, and if so it should be shewn on the other side; and it shall be likewise intended, that all suits shall cease only between the plaintiff and defendant, and that was an award on both sides, because it has the effect of a release; and also A. the defendant may undertake for B. his partner, and having promised that he should perform the award on his part (tho' B. be not bound) yet if B. refuses, it is a breach of A.'s promise, and so the plaintiff had judgment upon the first argument. 2 Mod. 227. Pasch. 29 Car. 2. C. B. Strangford v. Green.

15. An award that one of the parties shall do a thing out of his power, as to deliver up a deed which is in the custody of J. S. is void; agreed per Cur. 12 Mod. 585. Mich. 13 W. C. B. Lee v. Elkins.

(G) Against

## (G) Against Law.

[1.] If an arbitrator awards a thing against law, this is void. 19 E. 4. 1.]

2. An award was, that interest should be paid to the plaintiff for money, &c. Defendant demurred, for that the award was void, because it was for payment of interest, and usury is a thing unlawful; but it was answered, that it shall not be taken for usury, but rather for damages for forbearance of the money; but admitting it was for interest in the proper signification of the word, yet 'tis good, for by the statutes, &c. contracts for interest money are not void, so as they did not exceed so much as is limited by those laws; and the opinion of the Court was, that the award was good; for an arbitrement shall not be taken absolutely upon the bare words. No judgment was given. Win. 114. 120. Hill. 22 Jac. C. B. Gibson v. Ferrers.

Br. Arbitrement, in pl. 39. cites S. C. & S. P. by Brian and Choke.

## (G. 2) Award, good in General.

[ 61 ]

1. TO make a good award, there are five things requisite; 1. Matter of controversy. 2dly, A submission. 3dly, Parties to the submission. 4thly, Arbitrators. 5thly, Giving up the award. D. 217. a. pl. 60. Trin. 4 Eliz.

In the form of every arbitrement, five things are specially to be re-

garded; 1st, that it may be made according to the very submission, or compromise touching the things compromised, and every other circumstance. 2dly, That it be a final end of the controversies compromised. 3dly, That it appoint either party to give or do unto the other something beneficial in appearance at least. 4thly, That the performance thereof be possible. 5thly, That there be a means how either party may by law attain unto that which is awarded unto him. For if it fail in any of these points, then is the whole arbitrement void, and of none effect. 2 Weist's Symboleog. 167. b. S. 44.

2. A. of the one part, and B. and C. of the other part, submitted to the award of J. S. so as the arbitrement be made and published *utrique partium predicta* before such a day. It was made, and published to A. and B. but not to C. The whole Court held it no sufficient publication, for it ought to have been delivered omnibus partibus, because it ought to be performed by every party, and the word *utrique* should be expounded *separatim* and not conjunctim; and adjudged for the defendant. Cro. E. 885. pl. 24. Pasch. 44 Eliz. C. B. Hurgate v. Mease and Smith.

5 Rep. 103. Hurgate's Case, S. C. adjudged accordingly; and also resolved that if there had been two of the one part and two of the other part, a de-

liberty to one of each part, would not be sufficient.—Mo. 642. pl. 885. S. C. held accordingly. —S. C. cited, 3 Mod. 331.

3. A man is bound to stand to the arbitrement of A. B. C. and D. of all actions and demands, so as it be made in writing by the said A. B. C. and D. or any two of them, under their hands and seals; two of them make the arbitrement; resolved to be good, if it be under their hands and seals, for the arbitrators are made judges by the assent and election

Yelv. 203. S. C. adjudged, per tot. Cur.—Brownl. 112. S. C. but seems

only a trans- election of the parties; and the parties here, did not fix their trust  
 fation of in all four of them jointly, but conjunctim & divisim. Cro. J.  
 Yeiv. Bulst. 123. S. C. 277. pl. 8. Pasch. 9 Jac. B. R. Shallows v. Girling.  
 adjudged ac-  
 cordingly.——S. C. cited, per Cur. Cro. J. 400. pl. 8.——S. C. cited, arg. 3. Bulst. 63, 64.

Debt upon obligation to stand to the award of 4, naming them particularly, so as the same be made, and delivered up in writing, under the hands and seals of the 4, or any 3 of them; three of them made an award, under their hands and seals; resolved, that tho' at the first the words are to them 4 jointly, yet it is sufficiently disjointed afterwards by the words (so as the same be made and delivered by any three of them) and an authority may be well divided, but an interest cannot, and judgment in B. R. was affirmed, in Cam. Scacc. Cro. J. 399. pl. 8 Pasch. 14 Jac. Berry v. Penryng.——Mo. 849. Barry v. Perin. pl. 1154. B. R. the S. C. agreed to be well made; and that arbitrement shall be taken by equity, that all the parts may stand.—Roll. Rep. 223. pl. 19. S. C. S. C. adjournatur.——Ibid. 275. pl. 31. S. C. adjudged and affirmed accordingly.——3 Bulst. 62. S. C. adjudged accordingly, in B. R. and ibid. 169. S. C. affirmed in Cam. Scacc.——Bridgm. 90. Mich. 12 Jac. Perryn v. Barry, S. C. adjudged, and judgment affirmed.

Submission was to 4, so that they made it by the 16th Nov. and signified it under the hands and seals of 2 of them; an award under the seals of two was held good upon demurrer and judgment, for the plaintiff. Vent. 50. Mich. 21 Car. 2. B. R. Hill v. Langley.

4. An award took notice, that there was 72l. in controversy, and awarded only 50l. in satisfaction, and general releases to be given; it did not appear, that any other matter was in controversy, tho' the submission was general; and it was objected that 50l. could not be in satisfaction for 72l. it was adjudged, that the award was good, because the arbitrators might consider other matters between the parties; besides, it did not appear that 72l. was due, but only that it was in controversy; and it is unreasonable for him  
 [ 62 ] to find fault with what is done in his favour; and his objection is, that himself ought to pay 72l. and that the other is content with 50l. 2 Mod. 303. Pasch. 30 Car. 2. C. B. Godfrey v. Godfrey.

(G. 3) Award. Good. The Submission being by Attorney.

But if it had been said that the 20l. &c. shall be in satisfaction of all, it had been good, or that they have examined the accounts, and this was all that was due, or that this was for all due, or for the account, and  
 1. IF one as attorney to J. S. submits to an award, this shall bind the attorney, but where the award was that the attorney on behalf of S. S. should pay to the plaintiff 20l. and then plaintiff and defendant on behalf of J. S. should execute mutual releases to each other ad usum eorum alterius of all actions &c. concerning the accounts submitted, it was adjudged a void award because of one part only, the releases being to be made between plaintiff and defendant where they ought to be between the plaintiff and J. S. or to be delivered to the attorney for the use of J. S. For a release to the attorney cannot advantage J. S. and the Court declared they would, if they could, have construed it to be a release to J. S. but the words (ad usum alterius eorum) exclude this construction. 12 Mod. 129. Trin. 9 W. 3. Bacon v. Dubarry.

cited Roll Arbitrement 255. and tho' they have averred that this was for all due, yet if the award itself does not justify the averment it is not sufficient. It was adjudged for the defendants. Skin. 679. 680. S. C.——Had the release been awarded to the defendant to the use of J. S. or de & super præmissis, it had been a mutual award; but the award not being so, the pleading it to be made

made de & super præmissis cannot mend or extend it. 1 Salk. 70. pl. 3. S. C. — Comb. 439. S. C. adjudged for the defendant. — Carth. 412. S. C. and the award adjudged void. But per Cur. the submission by the defendant as attorney for J. S. is good, and would have obliged him to pay the money awarded, if the award had been reciprocal with respect to J. S. also. — Ld. Raym. Rep. 246. S. C. adjudged for the defendant.

2. If a person *submits* to an award *on the part* and behalf of a *stranger*, it was said, that his bond shall be forfeited if the stranger does not do what the award requires him to do, and the Court inclined so. Comyns's Rep. 184. pl. 115. Trin. 8 Ann. C. B. in *Cafe of Shelf v. Bailly*.

## (H) *How* it may be made.

Fol. 250.

[1. THE arbitrators *cannot* make their award by parcels. 19 E. 4. 1. per Choke.] S. P. per Bryan and Choke. Br.

Arbitrement in pl. 39. cites S. C.

[2. If 2 submit all debts, trespasses, and other things, ita quod the award be made before such a day, if the arbitrators make an *award of debts at one day*, and of *trespasses at another day*, and of *other things at another day*, though they are *all before the day appointed*, yet this not a good award as to the 2 last awards, because they have power to make but one award. 39 H. 6. 12.] S. P. by Danby J. and he held that that and the after awards are void; but per Moyle contra if

all be done before the day assigned. Br. Arbitrement, pl. 29. cites 39 H. 6. 9. — Fitzh. Arbitrement, pl. 32. cites S. C. & S. P. accordingly, by Moile; but Prifot held, that the parties in this case are not bound to perform the award first made, but Fitzh. says, Quod quære &c.

[ 63 ]

[3. But the arbitrators may at one day\* consider one point, and at another day another, and at a 3d day the 3d point, and then give one judgment upon all the points, so that the judgment ought to be one and not several. 39 H. 6. 12.]

\* Br. Arbitrement, pl. 29. S. P. by Danby, and the words there are

(commoner sur une point) and cites 39 H. 6. 9. — Fitzh. Arbitrement, pl. 13. cites S. C. but I do not observe S. P. there.

[4. If the arbitrators award that one of the parties shall pay 10l. to the other, and in surety of payment he shall be bound in an obligation to the other by the advice of the arbitrators, this is no good award, because they cannot award by parcels. 19 E. 4. 1. per Choke.]

Br. Arbitrement, in pl. 39. cites S. C. & S. P. by Brian and Choke. — S. C. cited Arg. Hardr. 45.

[5. But if the award be that one shall pay 10l. to the other, and in surety of payment he shall be bound in an obligation to the other by the advice of his counsel, this is good, for it is incident and pursuant that his counsel shall make the payment sure to be paid. 19 E. 4. 1. per Choke.]

Br. Arbitrement, in pl. 39. cites S. C. & S. P. by Brian and Choke. — Ibid. 51.

cites S. C. and 18 E. 4. 22, 23. [which is the first part of the S. C.] — See pl. 7. infra.

As by the advice of the counsel of the party. *[6. But it had been otherwise if the security had been to be made by the advice of a stranger. 19 E. 4. 1. per Choke.]*

Br. Arbitrement, in pl. 39. cites S. C. by Brian and Choke. — Br. Arbitrement, pl. 51. cites 18 E. 4. 22. 23. and 19 E. 4. 1. [which is a continuation of S. C.]

Award was, *that the defendant should release all actions, &c. as such a one [a stranger] should advise.* Adjudged void to refer it to the act of another, and that the defendant is not bound to perform it. Cro. E. 726. pl. 59. Mich. 41 & 42 Eliz. C. B. Emery v. Emery.

Sty. 217. S. C. and judgment for the plaintiff nisi. — A diversity was taken by Doderidge and agreed to by the Court, between a ministerial and judicial act; that in the first case he may reserve a power to himself or a stranger; to himself, as if he awards that the one shall pay the other so much unless he shew an acquittance to the arbitrator that he has paid it before, this is good, because it makes the arbitrement certain now; but this is a ministerial act depending thereupon; [6] to a stranger as 20 H. 6. Statham's Abridgment, that if award be that the one pay the other 10l. for a horse if J. S. says that he is worth so much, and if he is not worth so much, then so much as he is worth, this is a judicial act, and so binds neither him nor the stranger. Palm. 146, 147. Mich. 18 Jac. B. R. — 2 Roll. Rep. 214. same diversity taken by Doderidge, and agreed by the Court, and the Case of Statham is there cited as in tit. Arbitrement, 30 H. 6. but says, that that Case there put is a ministerial act.

[7. If there be an award that one party shall pay 10l. to the other, and that the other shall make a general release as fully and beneficially as counsel shall advise, this is a good award, for the counsel hereby hath not power to do any judicial act, but a ministerial only, for the arbitrator hath directed the extent of the release, scilicet, to be general, and the counsel are only to make it as strong in law as they can. Tr. 1650. between Cater and Startut, adjudged upon demurrer. Intratur Hill. 1649. Rot. 1025.]

that in the first case he may reserve a power to himself or a stranger; to himself, as if he awards that the one shall pay the other so much unless he shew an acquittance to the arbitrator that he has paid it before, this is good, because it makes the arbitrement certain now; but this is a ministerial act depending thereupon; [6] to a stranger as 20 H. 6. Statham's Abridgment, that if award be that the one pay the other 10l. for a horse if J. S. says that he is worth so much, and if he is not worth so much, then so much as he is worth, this is a judicial act, and so binds neither him nor the stranger. Palm. 146, 147. Mich. 18 Jac. B. R. — 2 Roll. Rep. 214. same diversity taken by Doderidge, and agreed by the Court, and the Case of Statham is there cited as in tit. Arbitrement, 30 H. 6. but says, that that Case there put is a ministerial act.

[8. If the award be that one party shall pay 105l. at such a day, and if he does not pay it at the day, that he shall pay after at such a day 110l. this is a good award, for it is but a penalty for the nonpayment at the day, which was all in the power of the arbitrators. Hill. 2 Jac. between Royson and Rydal adjudged.]

[ 64 ]  
Hob. 218.  
pl. 282.  
Warley v.  
Beckwith  
S.C. & S.P.  
but Curia  
advocare  
vult —  
S. C. cited  
Sid. 59. in  
pl. 27.

[9. If 2 submit themselves to the award of J. S. ita quod fiat before Michaelmas, and the arbitrator awards that one shall pay 5l. to the other for 10 load of wood, and awards several other matters for other things, and after this they award that if he that is to pay it can disprove or better prove the payment of any of the said sums before them, or any of them before the said feast of Michael, then so much as is proved shall not be paid at the said feast, this is a good award, for the first part is good, and so thereby the authority of the arbitrators ended, and then a reference to prove or disprove is merely void. Pasch. 16 Jac. B. between Beckwith and Warley adjudged. Vide (as it seems) the same Case Hobart's Reports, Case 281.]

Debt upon  
an obliga-

\* Fol. 251.

tion to perform an award which was made unless the party shew cause to the contrary

[10. If an award be made touching certain currants, that if the defendant before the 20 December can make it appear that the currants were delivered to the plaintiff, that then the arbitrators should make a further award within 14 days after if they can agree, otherwise (\*) J. S. as umpire should conclude it within 7 days, and that the plaintiff and defendant should stand to the award of the arbitrators, if they make any, or of the umpire, &c. and if the defendant before the said 20 December, do not shew any such testimony, then the arbitrators award that the plaintiff shall not pay for the currants, but shall be free from any other claim; and also the arbitrators award that defendant shall pay 19l.

10l. 12s. before the first day of January after, si nullum ulterius arbitrium fuerit for the currants before the said time, this award is void, though it be averred that no other award was made before the said first of January, for the award, that if it be made appear &c. that they will make another award, or make an umpire, is void, for they cannot make an award by parcels, nor make an umpire, and then the last clause that the defendant shall pay 10l. 12s. if no other award is made before the 1st Jan. has dependance upon the first part of the award, which was void, and it was not intended that the defendant should pay the money if the arbitrators or umpire made any award before, and if they had made any award this had been void. Mich. 9 Car. B. R. between *Brown and Dakon*, adjudged per Curiam. Intratur Tr. 9 Car. Rot. 510.]

[11. The arbitrators cannot award that they shall stand to the award of others, for the trust reposed in them cannot be transferred to others, for by the submission they are made judges.]

within 6 days, held no award. Hardr. 45. Arg. cites Pasch. 13. Car. C. B. Loggins v. Blagrove.

In debt the defendant pleaded, that they put themselves

in arbitrement of 2 who awarded that they stand to the arbitrement of W. P. which W. P. made an award, which he has performed, and there admitted that arbitrators may award that they stand to the arbitrement of another. Br. Arbitrement, pl. 9. cites 47 E. 3. 20. but the law is contrary, as it seems, which see anno E. 4. upon which such award is void.

[12. If an award be that the award before made by J. S. shall stand in all things, but whereas in the said award one was to pay 10l. at Michaelmas, now they award that he shall have day to pay it till the feast of Christmas after. Tr. 3 Jac. B. dubitatur.]

[13. If an award be, that one shall pay so much money to the other, and if it can appear that more was due, and due proof is made thereof within one month, then he shall pay this also, and the submission was ita quod arbitrium fiat before such a day, which was before the end of the month, it seems that this is not a good award, because it is not final. Mich. 10 Car. B. R. between *Jeanes and Fouch*, dubitatur, the issue being nullum fecerunt arbitrium, and this found for the plaintiff. Intratur M. 9 Car. Rot. 470. but Hill, 10 Car. the judgment in Banco was affirmed upon the words of the submission, admitting this part to be void, because it was not averred that there was any doubt thereof before the submission.]

[14. If there be a submission of all controversies touching a voyage to sea, and an obligation with condition for performance thereof, and an award is made that one shall pay his part of the charge of the voyage, and shall allow his proportionable part of the loss that shall come to the ship by the voyage, upon account; and it is awarded further of the other part &c. Tho' this award be of itself uncertain, yet inasmuch as it may be reduced to a certainty, this is a good award. Mich. 10 Car. B. R. between *Beale and Beale*, adjudged upon a demurrer in an action of debt upon an obligation. Intratur 10 Car. Rot. 866.]

[ 65 ]  
Cro. c. 383. pl. 13. S. C. but S. P. does not appear; but the award there being to pay the charges of such a suit, which was objected to be uncertain. Sed

non allocatur; for they are certain enough when the attorney has made a bill of charges; and judgment accordingly.

In debt upon bond for performance of an award, the defendant pleaded no award. The plaintiff replied an award that the defendant should pay 20s. upon condition that each should acquit the other &c. and that the defendant should pay the charge of a suit now depending, and the plaintiff should give the defendant a bill of them; and the plaintiff gave the defendant a bill of the charges, amounting to 40s. which the defendant had not paid. And upon a demurrer it was objected that

this award was void, because it was conditional, viz. that the plaintiff should pay 20s. to the defendant, upon condition that each should acquit the other; besides it doth not ascertain the charges, but refers them to a bill to be given by the plaintiff. But per Cur. as to the first condition to acquit, it is an award to acquit; and as to the charges, they are ascertained by the bill delivered; and judgment for the plaintiff. 3 Lev. 18. Pasch. 33 Car. 2. C. B. Linfield v. Ferne.

Award that one shall release to the other by the advice of J. S. is good; for this reference is not but for execution of the award. But the arbitrators cannot refer

their arbitrement to others, or to an umpire, unless the submission be so; nor make their arbitrement in the name of them and a third person to whom no submission was made, nor can they alter it after it is once made. Jenk. 128. pl. 61.

The award was, that the plaintiff should make such a release as one of the arbitrators should approve. Adjudged that it was void, because the authority being given to both, was by this means divided, and given to one of them. Nelf. Abr. 240. pl. 1. cites Mich. 41 Eliz. Emery v. Emery.—Cro. E. 726. pl. 59. S. C. but there it is that the release was left to the direction of a stranger.

15. Where a man is bound to stand to the award &c. who awards that action shall be taken between the parties by advice of W. and P. this is a good award; for by this W. and P. are not arbitrators, but executors of the arbitrement; per tot. Cur. except Yelverton. But per Yelverton, it is not good for the uncertainty, because W. and P. shall make advice, which is uncertain till it be notified. Br. Arbitrement, pl. 37. cites 8 E.

4. 1.

16. But if he had awarded that the parties stand to the arbitrement of W. and P. this had been void; for he cannot give his power over. Ibid.

17. A. sued to have an award made (by B. and C. arbitrators indifferently chosen) performed, and both parties were bound each to other for performance of the award, and one part of the award was, that if any question did grow between the parties, the arbitrators should end it. It is ordered a subpoena to shew cause. Cary's Rep. pl. 80. 19 Eliz. Barker v. Barker.

Poph. 15. Sherrey v. Richardson, S. C. and it seemed to Popham that the award is void, and consequently that the plaintiff should be barred.—S. C. cited 59. pl. 27. Arg. Mich.

18. Award was, that each should give to the other, within 4 days after the award, a general release of all demands till the day of the obligation; provided that if either of them dislike the award within 20 days after the award, and should pay to the other within the said 20 days 10 s. the arbitrement to be void. It was holden in this case, that the first part of the award was good, and the proviso, being repugnant, void; and that, by the non-performance of the release within 4 days, the bond was forfeited, and the proviso cannot save the bond forfeited; and adjudged for the plaintiff. Cro. E. 291. pl. 1. Hill. 35 Eliz. B. R. Sharley v. Richardson.

[ 66 ] 13 Car. 2. B. R. in Case of Kinge v. Fines, which was an award between A. and B. that A. should pay 20l. and that B. should release, provided if one of them shall be [as the now defendant is] discharged of any arrears due to soldiers by the act of indemnity (which was to be passed by parliament) then the award to be void. All the Court held, that the proviso being void the whole award was void, because it is entire, and all being awarded to be void upon a subsequent accident, what they have awarded in presenti is not good, nor is consonant to the submission (which is in presenti) to make the award depend on a thing in futuro.

19. The condition of the bond was, of all matters &c. till the making the obligation. The obligation was made May 1st, at 12 o'clock at noon. The same morning notice was given to the arbitrators of a difference about a trespass done by the plaintiff



till the same morning, whether this trespass should be arbitrated, because there cannot be a *fraction of days*, was not argued, or any opinion of the Court delivered; only Coke cited 5 E. 4. 208. that they ought to arbitrate of that, because the condition was of all matters till the making of the obligation. Brownl. 123. Trin. 11 Jac. Penniworth v. Blaw.

20. Submission was of a controversy concerning the lease of a house which the defendant claimed by lease from B. for 6 years, at 15l. per ann. payable quarterly, which rent was arrear for a year. The award was, that he should pay to the plaintiff for this rent 13l. 6s. 8d. and that he should enjoy for three years and a half, and should pay for it yearly 15l. at Lady-day and Mich. or within 40 days after, and that if he failed of the payment, then the award for his enjoying it should be void. It was held, that this conditional award is good enough as to the enjoyment; for it is absolute if the other pays the rent, and otherwise it is his own default; and judgment for the plaintiff. Cro. J. 423. pl. 4. Pasch. 15 Jac. Furfur v. Prowd.

21. Tho' several matters are in controversy, yet if one only is notified to the arbitrator, he may make an award thereof; for the arbitrator is in lieu of a judge, and his office is to determine secundum allegata & probata; and it is the duty of the parties grieved, and who know their particular griefs, to notify their causes of controversy to the arbitrator who is a stranger to them, and every one ought to do what lies in his notice. 8 Rep. 98. a. b. Hill. 17 Jac. in Baspole's Case.

2 Brownl.  
310. S. C.  
& S. P. by  
Coke Ch. J.

22. If an award be made by me, that the one shall do such an act to the other, and that if any doubt arises touching my award, that then I will expound it, this is an ill award; per Doderidge J. to which Mountague Ch. J. agreed. 2 Roll. Rep. 215. Mich. 18 Jac. B. R.

23. Submission to J. S. of all actions and demands, to be made before the 8th of March. He made an award that all suits between them should cease, and that C. one of the obligors should pay to the plaintiff 40l. viz. 10l. at Mich. &c. and if before the last payment, videretur to the arbitrator, that C. was engaged for the plaintiff in any debt not satisfied, they should repay unto him so much as the said debt not satisfied did amount to; and if any doubt shall arise concerning the award, the parties should stand to his exposition. Resolved it was a void arbitrement; for first it appoints the payment of 40l. and after appoints, si videretur to him that C. was engaged, &c. that he should repay back, and so it was not a final award, but reserved part to his future judgment, which an arbitrator ought not to do; and when in this part it is void, so as it cannot be performed, it is totally void; and it was adjudged for the defendant. Cro. J. 584. pl. 5. Mich. 18 Jac. B. R. Winch v. Sanders.

2 Roll. Rep.  
189. 214.  
S. C. ad-  
judged that  
the award  
is void.—  
Palm. 110.  
145. S. C.  
adjudged ac-  
cordingly.  
—Sid. 59.  
pl. 27. cites  
S. C.—  
But per Cur.  
if it had  
been, that  
if he had  
sworn any  
debt to such  
a sum, that  
this sum cer-  
tain should

be paid, peradventure it had been good enough. Cro. J. 585. in S. C.—2 Roll. Rep. 214. S. P. by Doderidge in S. C.—S. P. by Doderidge in S. C. Palm. 146.

If the award had been, that if it appears before such a day that he is indebted, that then he shall pay 10l. this is a good award; per Doderidge J. to which Mountague agreed. 2 Roll. Rep. 215. Mich. 18 Jac. B. R.

[ 67 ] 24. It was provided by the award that *if any doubts arose, the arbitrators were to expound the same.* After the death of some of the arbitrators a doubt arose for want of the word (heirs,) whether an estate in fee or for life only was awarded. The *surviving arbitrators*, by writing under their hands and seals, declared, and the 2 survivors depofed, that they intended an estate in fee; and decreed accordingly. Chan. Rep. 84. 10 Car. Scot v. Wray. †

But they cannot reserve authority to themselves to execute at a future day. Cro.

J. 315. pl. 16. Mich. 10. Jac. B. R. Thirn v. Rigby.

25. A *submission was of all actions, matters, &c.* The award was, *that the defendant pay to the plaintiff 100 marks, which was for the costs of one suit only, and that &c.* It was objected, that this award was void, because the submission was general of all suits, &c. and of that opinion were all the Court; and adjudged for the defendant. Sid. 12. pl. 9. Mich. 12 Car. 2. B. R. Spigurnel v. Jones.

26. Debt upon bond conditioned, that whereas the *defendant by [for] himself and his son had submitted to the award of A. and B. ita quod &c. if they made none, then to the award of such umpire as they should choose*, to be made before 1 June. The arbitrators made no award, but the umpire awarded &c. that the plaintiff should seal three bonds to the defendant, and that the defendant should pay to the plaintiff 100l. which he had not done; and upon demurrer this was adjudged a void award, because *nothing was awarded concerning the son.* Lev. 139. Mich. 16 Car. 2. B. R. Bean v. Newbury.

2 Freeman. Rep. 133. pl. 162. S.C. and the judges were of the same opinion, and cited the Cases of WARD v. SAWER, CHILD v. COLWELL, and 13 Car. MAYER's Case, where by order of Court the submission and award were to be final without appeal or exception, that yet the Court did allow exceptions to the award as against a matter's reports, and the words without appeal or exception but formula clericorum; but the Court gave no opinion in the point. — A submission was by order of Court to a reference, and the award to be made to be confirmed by decree of the Court without appeal or exception; yet upon debate exceptions were admitted to the award. 2 Vern. 109. pl. 106. Mich. 1689. Hide v. Cooth.

27. On a submission to an award by rule of Court by consent, and that such award should be final, and stand ratified by decree without any appeal, the arbitrators had determined some matters, and had left others undetermined, and submitted those other matters to the Court; and whether this was therefore such an award (being but part of the matters referred) as was fit for the Court to decree, was the question; and tho' at law an award may be good, tho' but for part of the matters referred, unless the submission be conditional to make an award on the premises; yet equity, as it was insisted, ought not to decree such an award, unless it be of all matters referred; and so were both the judges of that opinion; for it is not a determination pursuant to the reference, and so the award was set aside. Per Ld. Keeper and Master of the Rolls, assisted by Rainsford and Windham J. Chan. Cases, 186. Mich. 22 Car. 2. Hide v. Pettit.

The bond of submission was of all controversies depending &c. The award

28. An award was, *that the defendant should pay money, and that all suits should cease.* It was objected there, because no release was awarded to be given, that this award was not mutual. But per Cur. the awarding that all suits shall cease hath the effect of a release, and the submission and award may be pleaded in discharge

as

as well as a release; and judgment accordingly. 2 Mod. 227. *was, that all suits now depending between the parties shall cease, and that the defendant should pay &c.* 228. Pasch. 29 Car. 2. C. B. Strangford v. Green.

Adjudged in error in B. R. that an award that all suits &c. shall cease, is final; for the meaning is not that the party shall be nonsuit, or should give over and begin again, but that the suit should absolutely cease for ever, so that the right is gone, because the remedy is. 1 Salk. 74. pl. 14. Trin. 2 Ann. B. R. Simon v. Gavil. —6 Mod. 33. Squire v. Grevel, Mich. 2 Ann. B. R. the S. C. and judgment affirmed accordingly per tot. Cur.—2 Ld. Raym. Rep. 961. Squire v. Grevelt, S. C. and judgment affirmed per tot. Cur.

An award was, that a suit in Chancery should be dismissed. It was objected that this was void, because not final; for the party may dismiss his bill, and begin again, and so it is like an award to be nonsuit. The Court said, that an award to be nonsuit is not final in the nature of the thing, but they would intend this a substantial dismissal and perpetual cesser in this case. 1 Salk. 75. pl. 17. Mich. 3 Ann. B. R. Knight v. Burton. [ 68 ]

29. Where matters are submitted, they ought to award all absolutely, without referring to any future examination; and that he knew but one case where arbitrators may refer to a future act, and that is, where they award the payment of such costs, as an officer of the Court shall tax, which has been allowed per Holt, sed adjournatur. 12 Mod. 139. Mich. 9 W. 3. Selby v. Russell. Comb. 456. S. C. & S. P. the award (inter alia) was, that if the plaintiff did upon account prove certain articles against the defendant, then he should pay so much as the plaintiff was damaged thereby, and that if the plaintiff makes out upon oath, before a judge, any disbursements for the defendant, then the defendant should pay them also; but if the plaintiff proves not these matters within a certain time, then they award general releases. Adjournatur.

30. Where the submission is simply without condition, an award of part is good. 12 Mod. 585. in Case of Lee v. Elkins.

31. Though award should be certain and final, yet if they are as certain and final as the nature of the thing will bear it is sufficient; by 3 J. contra Page J. Gibb. 272. Pasch. 4 Geo. 2. B. R. Philips v. Knightly.

## (I) How it is to be made. [Satisfactory, &c.]

[1.] If a trespass be put to award, if they award nothing to be paid or done by him that did the trespass, it is worth nothing. \* Br. Arbitrement, pl. 6. cites S. C. & S. P. by Finch, quod

\* 43 E. 3. 28. b. † 46 E. 3. 17. b. ‡ 19 H. 6. 37. 20 H. 6. 19.] non negatur. † Br. Arbitrement, pl. 8. cites S. C. —Fitz. Arbitrement, pl. 21. cites S. C. & S. P. by Finch, quod

[2. So if they award that he shall wage his law that he is not guilty, and that he shall be quit, and he does it accordingly without satisfaction. 46 E. 3. 17. b.] Br. Arbitrement, pl. 8. cites S. C. & S. P. and Winche and

Finch held, it is a good arbitrement. But Brooke says, Quære; because the defendant afterwards pleaded not guilty.—Fitzh. Arbitrement, pl. 21. cites S. C. & S. P.

[3. [So] If a trespass for taking his cattle be put to award, if they award that the owner shall have his goods again; this is not good, because there is no (\*) satisfaction awarded for the damage of the taking and detainue. 45 E. 3. 16.] Fitzh. Arbitrement, pl. 252.

S. C.—S. P. accordingly, by the best opinion. Br. Arbitrement, pl. 32. cites 12 H. 7. 14. 15.—But contra by Tremaine, if the award had been that he should carry them from such a place to such a place. Ibid.

## [4. An

Br. Arbitrement, pl. 7. [4. An award to pay parcel of a debt due, is not good. 45 E. 2. cites S. C. 16. contra.]

accordingly; that an award to pay part, and retain the rest, is not good, or to pay the moiety and retain the other moiety, it is no plea; but Brooke says, Quere, for it is not adjudged; but he says it seems that it is no plea.

\* Br. Arbitrement, pl. 7. [5. So an award, that the owner shall have parcel of his own goods, and [the other] the other parcel, is not good; contra \* 45 E. 3. cites S. C. & 16. 10 H. 4. Arbitrement 19.] S. P. says

Quere, for it is not adjudged, but it seems that it is no plea.

[ 69 ]  
Br. Arbitrement, pl. 21. [6. Where each party is indebted in 40s. the one to other, it is a good award, that the one shall be quit against the other, for there is a sufficient satisfaction. 19 H. 6. 37. b.] cites 19 H. 6. 36. S. P. accordingly by Newton.

\* Br. Arbitrement, pl. 3. [7. So where each had done a trespass against the other. \* 20 H. 6. 19. 22 H. 6. 39. agreed.] cites 20

H. 6. 18. 19. S. P. and if the trespass done by the one is greater than that done by the other, and that he shall therefore pay 10l. to the other, this is good. — Fitz. Arbitrement, pl. 8. cites S. C. — † Br. Arbitrement, pl. 23. cites S. C. — Fitzh. Arbitrement, pl. 9. cites S. C. — Br. Arbitrement, pl. 38. cites 16 E. 4. 8. S. P. — Br. Arbitrement, pl. 21. cites 19 H. 6. 36. S. P.

\* The original is (ballic.) [8. In a writ of account against a \* master of a ship, it is a good plea for the defendant to say, that there was a great tempest upon the sea, so that he was driven to land, and upon the point of being drowned, and thereupon he was at much cost upon the ship, and that after the plaintiff and defendant submitted to the award of J. S. who awarded, that he should deliver to the plaintiff the same goods, on which he demanded an account &c. the which he hath delivered &c. (for in this case he ought to have been allowed the costs, which might amount to more than the profits he made of his goods.) 2 H. 5. 2.]

[9. If two submit an account of a certain thing to the award of certain arbitrators, who award that the one shall account before such auditors that the other shall assign, and that if he be found in arrears, he shall pay them, and ipso facto, each shall be quit against the other, this is no good award. 30 H. 6. Arbitrement 27. adjudged, and Statham Arbitrement, same Case.]

[10. If a man and a woman submit themselves to an award, it is no good award that they shall intermarry &c. for this is not intended any advantage. 9 E. 4. 44. per Choke.]

— [11. So it is no good award that one shall go to Rome or Paul's, for this is not any advantage. 9 E. 4. 44. per Choke.]

Fitzh. Arbitrement, pl. 16. cites S. C. [12. It is no good award that one shall make a release to the other of land, in satisfaction of an action, if he, to whom the release is to be made, had nothing in the land at the time, for then it is no advantage to him. 9 E. 4. 44. b.]

[13. If a man makes to me a release of certain land of which I am seised, and after he gets the release again, and then he and I submit all matters to the award of J. S. who awards that he shall deliver to me all the evidences concerning the land in satisfaction of a certain action,

*action*, this is a good award though these are my own evidences, for this is an *advantage* to me to have them without suit. 3 E.

4- 44. b. per Catefby.]

[14. If an *award* be that one of the parties shall release all his right to the other in certain land, of which the other is seised &c. though he who is to make the release hath not any right, yet this is a good award, for it is an advantage to have such release. 9 E.

Fitzh. Arbitrement, pl. 16. cites S. C.

4- 44.]

[15. An award ought to be a final determination of the matter, otherwise it is not good. 19 H. 6. 37.]

Br. Arbitrement, pl. 21. cites S. C. &

S. P.—Fitzh. Arbitrement, pl. 6. cites S. C.—See (H) per totum.

[16. As if 2 have actions the one against the other, and the award is that each shall be nonsuit in his action against the other, this is not good, because it is not final, for they may bring new actions for the same matter. \* 19 H. 6. 36. b. 37. adjudged. Dubitatur † 5 H. 7. 22. b.]

\* Br. Arbitrement, pl. 21. cites S. C.—Fitzh. Arbitrement, pl. 6 cites S. C.

† Br. Arbitrement, pl. 31. cites S. C. and tho' the Court at first thought it not good, yet afterwards they inclined otherwise.—Ibid. pl. 52. cites S. C. & S. P. and that such award is good.—Fitzh. Arbitrement, pl. 17. cites S. C. [ 70 ]

[17. So it is no good award that one shall discontinue an action which he hath against the other, and that the other shall do the same of an action which he hath against him, because it is not any final determination of the matter between them. Contra. \* 15 H. 7. 22. per Curiam.]

\* This seems misprinted, and that it should be 5 H. 7. 22.—Br. Arbitrement, pl. 31.

cites 5 H. 7. 22. S. P.—Ibid. pl. 52. cites S. C.—Fitzh. Arbitrement, pl. 17. cites S. C.

[18. But it is a good \* award that the plaintiff in an action shall make a retraxit (for this is a good bar) 5 H. 7. 22. b.]

Fol. 253.

Br. Arbitrement, pl. 31. cites S. C. and S. P.—Fitzh. Arbitrement, pl. 17. cites S. C.—\* Orig. is (Barr.)

19. Where it is awarded that A. shall release the surety of the peace which he has against B. which B. before this, had purchased superfedas of the peace, the award is void; for by the superfedas the surety of the peace is determined, because surety was found before. Br. Arbitrement, pl. 40. cites 21 E. 4. 38, 39.

20. And if they award that he shall release his suit against B. and he has not any suit against him, this is a void award. Br. Arbitrement, pl. 40. cites 21 E. 4. 38, 39.

21. A. and B. submitted matters to award. The matters of A.'s side were pardoned by the act of indemnity made 12 Car. 2. and the award was made after that statute. It was moved that this award was void of one part, and consequently void in toto. But the Court held it good of both parts; for they would intend that some of the matters are not pardoned, (unless it be pleaded otherwise) or rather than the award shall be void, that the party here concerned is a party therein excepted. Sid. 178. pl. 11. Hill. 15 & 16 Car. 2. B. R. Anon.

ment was given for the plaintiff, for tho' the award be

made but of one part, yet if the defendant may plead it in bar of the other action brought against him for the same cause, in all such cases the award is good.—Sty. 23. Trin. 23 Car. Roll Ch. J. said it was held 13 Jac. that the words *super præmissis* in the award will not help an award made but of one part, and seems to intend this case.

Court upon the matter. M. 13 Jac. B. between *Nichols and Grunwin* adjudged. Vide same Case, Hobart's Reports 68. where it is said, that no judgment was given therein.]

[12. If an award be *de et super præmissis*, that each of the parties shall make a release the one to the other of all matters till the award, and that one of the parties shall pay 10l. to the other at a day, & *quod partes predictæ continuarent amantes & amici ut in priori tempore*, this is a good award, for though it be admitted that the award as to the general release till the award made, is void (though the Court inclined e contra as to this) yet the award for the payment of 10l. is an award of both parts, because it shall be intended to be in satisfaction of all matters between them, especially in this case, when it is said the parties shall be friends ut in priori tempore, Tr. 8 Car. B. R. between *Raymond and Popley*, adjudged upon a demurrer in debt upon an obligation for non-performance of the award, and the breach assigned in non-payment of the money, and the same term also adjudged upon demurrer in another case upon the same award between *Popley and Popley*, I myself being de consilio querentis.]

Sty. 44. S. C. (the writings awarded to be paid for by B. were the bonds of submission) and Roll J. held the exception good, and said, the charge for making them, is not within the submission, for the bonds were made before the submission; and that it was held 13 Jac. that the words *super præmissis* in the award

[13. If an award be made between A. and B. that A. shall pay to B. 10l. and that B. shall pay for the making the writings of the award, this is a void award, there being nothing awarded for B. to do, but the making of the writings, which was out of the submission, this arising after the submission, and not awarded in recompence of the precedent matters submitted, and so an award but of one part. Hill. 22 Car. B. R. between *Capel and Allen* adjudged Rot. 639.]

[ 73 ] will not help an award made but of one part.—All. 10. S. C. adjudged a void award because of one side only; for it did not appear that B. was bound to pay for them, which was the only recompence for A. besides this matter is subsequent to the submission, and so cannot be intended a good recompence.—S. C. cited, Hard. 45. arg.—S. P. agreed, Bridgm. 91. Mich. 12 Jac. in Case of *Perin and Bradley*.—S. P. held to be void. Cro. J. 578. pl. 6. Trin. 18 Jac. B. R. in the Case of *Bufield v. Bufield*.

S. C. cited, Arg. Hard. 45.

[14. So if the award be that one shall pay to the other 10l. that both parties shall pay and discharge the reckoning of the house, which was expended at the meeting upon making the award; this is an award but of one part, and the discharge of the reckoning is out of the submission, this coming after the submission. Tr. 1650. *Hall and Massey* adjudged upon a demurrer. Intratur Hill. 1649. Rot. 673.]

Cro. J. 149. pl. 8. Genings v. Markham, S. C. the whole Court were of opi-

[15. If two submit themselves to the award of J. S. for the title of certain copyhold land, and J. S. awards that one, scilicet A. shall pay to the other scilicet B. 6l. upon the 21st day of May, and 6l. at Michaelmas next ensuing, and that B. shall release to A. all his right in the copyhold *super præd. primo die Maii*, omitting *vicefimo*, and

and awards further, that he shall make further assurance within 3 days after &c. this is a void award, for the award for making of the release super *præd. primo die Maii* is void, there being no such day before mentioned, and it appears, that the release at the said day should be the principal consideration of his part, who ought to make it, and then the rest of the award for further assurance, which is good, is not sufficient, this being but part of the consideration and award of his part. Hill. 4 J<sup>a</sup>. B. R. between *Markham and Jennings*, adjudged upon demurrer.]

nion that the award was void in toto; for the recompence in the award ought to be equal and reciprocal, and if it be void on one part, it is void in

all. Sed adjournatur. — Yelv. 97. *Martham v. Jemx*, S. C. and it was argued that this clause for further assurance depends upon the repugnant clause of the release to be made; for the arbitrator intended, that the release limited to be made super *prædictum primum diem Maij* (whereas there is no such day) should be the first assurance, and that the assurances to be made by the subsequent clause, were intended only to strengthen the first release; quod fuit concessum per Curiam, and they held that the deeds shall be construed according to the intent of the parties, and upon the words to be collected thereupon, yet arbitrement is in nature of a judgment and sentence, in which there ought to be plainness, and no collection of the intent of the arbitrator; for it ought to be his judgment, and not the judgment of another upon his words. — Brownl. 92. *Markham v. Jurex*, S. C. and seems a translation of Yelv.

[16. If two submit themselves to the award of J. S. of all controversies, and J. S. awards that (\*) one shall pay 10l. to the other, at such a day, and that the other upon the receipt of the 10l. shall make a general release to the other, without appointing any other thing to be done by him who shall have the money, and not expressing that the 10l. shall be in satisfaction of matters in controversy, and tho' it is objected, that if he, to whom the 10l. is to be paid, refuses to receive it, then he is not bound to make any release, and then nothing is to be done by him, and so the award is but of one part, and only at the will of him, whether he will make a release; yet it was adjudged a good award, because when one is awarded to pay 10l. to the other, the other is by implication awarded to accept it, as if one had been awarded to pay 10l. in satisfaction of all the controversies to the other, if the other refuses to accept the 10l. yet this is a good award, because he is implicitly awarded to accept it in satisfaction &c. Mich. 22 Car. B. R. between *Linnen and Williamson* adjudged upon demurrer; Intratur P. 22 Car. Rot. 101. and this was after affirmed in writ of error in parliament, by the advice of all the judges.]

S. C. cited, \* 255.

and Powell J. of the same opinion, that when one is awarded to pay, the other by implication is awarded to receive it; but Holt. Ch. J. said, he doubted if an award that one shall pay implies that other is obliged to receive it. 2 Ld. Raym.

Rep. 965. Trin. 2 Ann.

[17. If the condition of an obligation be to perform the award of J. S. of all controversies, &c. ita quod fiat de præmissis &c. and the award is in this manner of writing, de & super præmissis, scilicet, it recites the submission, and then says that the differences being understood by them, [to be] pro eo quod certain things in a bill by the plaintiff exhibited, or likely to be exhibited, in the Star Chamber against the defendant, were for the most part acknowledged by the defendant, namely, that the defendant had taken of the plaintiff 40s. for a supersedeas to reverse an outlawry against the plaintiff, but had not performed it, & pro eo quod the defendant had taken of the plaintiff 20s. more as a fee, pretended it to be due to him upon an execution of 26l. sued against the plaintiff, the which the defendant, or any for

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him never executed, (he being then under-sheriff of the county of Dorset) et pro eo quod the plaintiff by the means of the defendant, was imprisoned by J. S. who arrested him without any warrant to him directed, and the plaintiff was compelled by J. S. to pay 20s. for the said injurious arrest, before he was permitted to go at large, ac pro eo quod the plaintiff was an honest man, and of good reputation, and an artisan, Anglice a tradesman, having a wife and six children, and by the said means had sustained great damage, discredit and scandal, *he awarded in ea parte modo & forma sequentibus*, videlicet, *that the defendant shall pay 500l. to the plaintiff* at certain days &c. this is a good award, tho' it was objected nothing was awarded of the other part, for he does not say that he awarded the 500l. to be paid in satisfaction of the said wrongs, nor in consideration of them, nor for them, so that it cannot be pleaded in bar of the said wrongs, for the words (*pro eo quod*) are not intended for the wrongs, but only for a reason of the award, which induced him to give the money, and the words (*in ea parte*) do not imply it to be in satisfaction, but he made his award in ea parte, scilicet, upon the premises. Mich. 16 Car. B. R. *Burbridge and Reymond* in a writ of error upon a judgment in Banco, where this was adjudged a void award upon demurrer, but now the Court seemed to incline that the award was good, but they affirmed the judgment for another clear defect in the pleadings of the award. Intratur Tr. 15 Car. Rot. 1657, for it cannot be intended that the money was paid for any other cause than that which is mentioned in the award.]

18. Where 2 or 3 things are put in arbitrement jointly, and they make award of part and not of all, this is a void award, by reason that it is a joint submission; per Prisot; quære inde, for it seems that his opinion is not law. Br. Arbitrement, pl. 29. cites 39 H. 6. 9.

Br. Conditions, pl. 182. cites S. C. & S. P. accordingly.—*A. and B. on the one part, and*

19. Where a submission is of all trespasses between A. of the one part, and B. and C. of the other part, and an award is made that A. pay 10l. to B. but says nothing of C. yet the award is good, for it might be that A. had offended B. but had not offended C. Nota. Br. Arbitrement, pl. 41. cites 22 E. 4. 25.

C. on the other part, submitted to an award, &c. the arbitrators awarded that B. should pay so much money to C. in satisfaction for the differences between B. and A. of the one part, and C. on the other, but made no award as to A. and after a verdict for the plaintiff it was moved in arrest, that the award was but of one side, for A. who was one of the parties submitting, was not concerned in it, and the award [submission] was with an Ita quod &c. and so the award ought to be general and include all parties; and judgment for the defendant. Sty. 471. Mich. 1655. *Morden v. Hart*,

20. Submission was of all suits between the parties then depending in the Spiritual Court concerning tythes; the award was, that the defendant should pay to the plaintiff 40s. on such a day for the tithes, &c. Adjudged, that the award was void, because there was not any thing awarded for the defendant to have, or that he be freed from the suits, and so he has no advantage thereby. Cro. E. 904. pl. 8. Mich. 41 Eliz. *Colston v. Harris*.

21. Upon a submission of all trespasses, duties, and demands, the award



award was that the defendant should pay to the plaintiff, in satisfaction of all trespasses done to him by the defendant before the day of the submission, so much. In debt upon this award, the defendant demurred upon the declaration, and insisted that the award was void, it being of one side, for the plaintiff was to do nothing. But adjudged good; for by the payment of the money he is acquitted of all trespasses done to the plaintiff, and it is a good bar against him, and it shall not be intended that the arbitrators had notice, that defendant had any cause of action against the plaintiff, unless, shewn on the defendant's part; and judgment for the plaintiff, Haughton hæsitante. Cro. J. 354. pl. 9. Mich. 12 Jac. B. R. Ormelade v. Coke.

22. If an award be, that an obligor in a single obligation shall pay the debt, this is no award, unless it be provided that he be discharged; for payment in that case is no discharge. Hob. 49. in pl. 55. Hill. 12 Jac. obiter. Brownl. 58. S. P. by Hobart Ch. J. obiter.

23. But if the award be that the one shall pay 10l. for trespass, it is good; for a satisfaction implies a discharge, and that is the reason of the judgment in Baspool's Case. Hob. 49, 50. in pl. 55. Hill. 12 Jac. obiter.

24. An award that one shall pay money, and the other shall execute a release to him who paid it, is a void award; but this must be intended where the submission is by word; for in such case the award is void, because it is of one side; for when the money is paid, the other hath no remedy to enforce the execution of a release; for he cannot have an action on the case; and the reason why it will not lie upon an award is, because that is in nature of a judgment. Poph. 134. Mich. 15 Jac. May v. Samuel. S. C. a Roll. Rep. 1. and on the point of the release the award adjudged ill, and judgment for the defendant. The same reason

why case will not lie on arbitrement is given by Coke Ch. J. Godb. 185. pl. 266. Patch. 10 Jac. C. B. in Case of the Ld. Mounteagle v. Pepruddock; and said it was wisely done by Manwood Ch. B. when he made an award that a release, or such like collateral thing, should be done, to make his award, that he should make the release or pay so much money, for which the party might have a remedy, and at another day the opinion of the Court was with Coke.

25. Award was, that the defendant pay the plaintiff 10l. and that the plaintiff pay the defendant the expences at making the award, and that upon all this being done, each shall give the other a general release. It was objected that the award was void, because nothing is awarded to the defendant but the release, and that is not to be made till all be performed, which cannot be, because the award of the expences at the making the award, which the plaintiff is to pay, is subsequent matter, and out of the submission; but Hale Ch. J. inclined that the release shall be made upon the performance of what is well awarded, and not stay till that be performed which is void, and so the award may be good. Sed adjournatur. 2 Lev. 3. Pasch. 23 Car. 2. B. R. Pinkney v. Bullock. Ibid. there is added a note, that afterwards 7 W. and M. in C. B. in Case of BAR-GRAVE v. ATKINS, it was adjudged upon the like award, that upon performance of what is well

awarded the release ought to be made, and that the award was good, tho' the same objection was made by Levins, as here. — 3 Lev. 413. Hill. 6 W. & M. in C. B. Bargrave v. Atkins, adjudged for the plaintiff.

Show 82.  
Thurby v.  
Halburt, S.  
C. The  
Court held it  
void as to  
[ 76 ]  
the sureties,  
but good so  
as to bind  
the party to  
become

bound; but the case was staid till moved on the other side.—Carth. 150. S. C. adjudged for the plaintiff, because the defendant was bound to give his own bond, tho' the award was void quoad the sureties; and that as soon as the defendant had delivered his single bond, the plaintiff was compellable to make a release; for the sureties were to be to the good liking of the plaintiff, and it is probable he might approve the defendant's single bond for his security, and this was the principal reason why judgment was given for the plaintiff.

3 Lev. 293.  
S. C. but  
S. P. does  
not appear.

26. *Award was, that the defendant should be bound with sureties, such as the plaintiff should approve, in the sum of 150l. to be paid to him at such a time, and that then they should seal mutual releases.* It was moved that the sureties are strangers to the submission, and so the defendant not bound to procure them; and per Cur the award is void, it being such as the plaintiff should approve; whereas if he does not like the security given, then he is not to seal a release, and then the award is only of one side. 3 Mod. 272. Hill. 1 W. & M. in B. R. Thirley v. Helbot.

27. H. and W. submit to the award of J. S. who awards that *H. shall pay to W. 15l. which he adjudged the said W. to have sustained in costs and damages, by reason of a suit without cause commenced by H. against W. and that all suits and differences between them, depending before the date of the bond, shall cease.* It was argued that it does not appear that any difference was between the parties, except the suit on which the 15l. costs were awarded, which was H.'s own suit, and so no benefit to him to stay it, and pay 15l. costs. It was answered, that other differences might be intended, tho' not set forth, and that this award stops H. from applying for costs, which W. might be subject to in the action mentioned in the award; and the Court inclined that the award was good; sed adjournatur. 2 Vent. 221. Mich. 2 W. & M. in C. B. Watmough v. Holgate. \*

28. *Award was, that the defendant should pay the plaintiff 7l. 15s. (but did not say in satisfaction of all demands) and that both of them should be at equal charge at the payment of the money &c.* And upon demurrer to this plea it was objected that the award was void, it being only of one side; for the money was not awarded to be paid in satisfaction or discharge of any thing; and judgment for the plaintiff, per tot. Cur. Lutw. 281. 283. Pasch. 3 W. & M. Russel v. Williams.

29. Two submit to an award. *Nothing was awarded as to one, but only that all actions shall cease;* yet the Court held this to be a good award. Comb. 212. Trin. 5 W. & M. in B. R. Edwards v. Pierce.

30. A submission to award was of all matters in controversy by rule of Court; and award was made that so much money should be paid on one side, and nothing was awarded of the other side; and moved to set it aside, as being an award only ex parte. Per Holt, the common exceptions against an award will not hold here, it being an award upon submission by rule of Court; for tho' there be no release awarded of one side, yet the submission was of all matters in controversy; and we will not grant an attachment before they tender a release; for if one comes to have aid of the Court,

Court, he shall do that which is fair and equitable before he has it. 12 Mod. 234. Mich 10 W. 3. . . . v. Palmer.

31. Award was, that the defendant should pay the plaintiff 12l. before such a day, and within a week afterwards should fetch away his mare and colt from the plaintiff. After 2 arguments judgment was given for the plaintiff by the opinion of 3 justices, contra Blencow J. because it appears by the award that the plaintiff had the possession of the mare and colt at that time, which shall not be intended a wrongful but rather a legal possession; as for damage feasant, bailment, or the like, whereby the plaintiff might have justified the detaining them, and then the award would be mutual. But a writ of error was brought. Lutw. 539, 540. Pasch. 12 W. 3. Cooper v. Hirst.

Upon exception taken it was held to be mutual, and implied a delivery by the plaintiff. Arg. Jd. Raym. Rep. cites it as lately adjudged in C. B. Hooper v. Hurst, S. C.

(L) How it is to be made. Where the Submission [ 77 ] is general without an *Ita quod* &c. de Præmissis. Fol. 256.

[1.] If there be a general submission the award may be of part of that which is submitted, without the residue, and this shall be good. 19 H. 6. 6. b. Curia.]

Br. Arbitrement, pl. 20. cites S. C.

[2. If a submission be by two to certain arbitrators of all matters &c. without any clause de *ita quod fiat de præmissis* &c. in this case the arbitrators have power to make an award of part of the matters between them, and not of the rest. M. 5 Jac. B. between Middleton and Wikes, per Curiam.]

Cro. J. 200. pl. 31. S. C. & S. P. by Coke Ch. J. and to this opinion the other justices in-

elined, but they would advise.——S. P. Noy 62. Pasch. 39. Eliz. Smith v. Woodstock. Cro. E. 839. pl. 14. S. P. said by Popham Ch. J. to have been adjudged.

[3. So if 3 things in particular are submitted generally without the said clause, they may make an award of any of them, without the others. Contra \* 39 H. 6. 11. b.]

\* Br Arbitrement, pl. 29. cites 39 H. 6. 9. by Priefet, that

it is a void award, by reason that it is a joint submission; but Brooke says Quære inde; for it seems that his opinion is not law.——Cro. J. 200. in pl. 31. Mich. 1. Jac. B. R. S. P. per Coke Ch. J. that they ought to make the award of those that are particularly named, without other notice.——Cro. J. 335. in pl. 9. Mich. 12 Jac. B. R. the S. P. accordingly, by Coke Ch. J.——8. Rep. 98. a S. P. resolved accordingly. Hill. 7 Jac. in Baspole's Case.

[4. If the submission be of the right, title, and possession of certain land, if they make an award only of the possession, this is good. 19 H. 6. 6. b. Curia.]

Br. Arbitrement, pl. 20. cites S. C. and the submission

was as to the right &c. of 30 acres, and the award was that one should enter, and have to him and his heirs 15 acres, and that the plaintiff should have to him and his heirs the other 15 acres.——Fitzh. Arbitrement, pl. 5. cites S. C. accordingly.

[5. So if the submission be of all actions real and personal, an award of actions personal will be good, tho' he makes no award of actions real. 19 H. 6. 6. b.]

Br. Arbitrement, pl. 29. cites S. C. & S. P. by Newton.

Fitzh. Arbitrement, pl. 5. cites S. C. accordingly.

Br. Arbitre-  
ment, pl.  
20, cites 39  
H. 6. 9.

Cro. J. 200.  
pl. 31. S.  
C. and S. P.  
accordingly  
by Coke Ch.  
J. and the

other justices inclined to that opinion.——Godb. 256. in pl. 352. S. P. obiter.——8 Rep. 98. a. S. P.——S. P. Noy 62. Pasch. 39 Eliz. in Case of Smith v. Woodstock.——4 Le. 94. in pl. 194. at the end, S. P. Arg.——Cro. E. 838, 839. pl. 14. Trin. 43 Eliz. B. R. Risden v. Inglet, S. P. held accordingly, and that it is all one where the words are, *so that the award be made of the premises, &c. and so as the same award be made before &c.* For *(the same award)* refers to all things mentioned before; so that if any part be omitted in the award, it is void for all.——Gouldsb. 125. pl. 14. Hill. 43. Eliz. Hamond v. Hatch, S. P. by Gawdy, and after adjudged accordingly.——The words in the principal case in Cro. J. 200. are, viz. So that the same award be made of the premises before &c.

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Cro. J. 200.  
pl. 31. S. C.  
& S. P. by  
Coke Ch. J.  
and to that  
opinion the  
other justices  
inclined, but

they would advise.——Where a submission is general of all actions, trespasses, and demands, and without any condition of *ita quod* it be made upon the premises, &c. in such case, if the arbitrators make an award of part it is good for part, tho' they know of other matters; but if the submission had been conditional it is otherwise; per Coke Ch. J. and seems agreed by Crooke and Doderidge J. Cro. J. 355. pl. 9. Mich. 12 Jac. B. R. in Case of Ormelade v. Coke.——S. P. and the Ch. J. said, that the arbitrators were bound to make their award upon all matters between the parties which had been laid before them, tho' there was not the general conclusion of *Ita quod &c.* In this case the arbitrators having overlooked some matters that were laid before them in the present case, the jury accordingly gave a verdict for the defendant, and found the award void. Barnard. Rep. in B. R. Pasch. 2 Geo. 2. King v. Hammerton.——See Freeman v. Bafpoole.

Cro. J. 200.  
pl. 31. S. C.  
& S. P. ac-  
cordingly,  
by Coke  
Ch. J. to  
which opi-  
nion the  
other justices

inclined, but they would advise.——Where the submission is of certain things in special, and with a proviso or condition that the award be made *de præmissis* &c. or words tantamount, there the arbitrator ought to make arbitrement of all, or otherwise it is void; but if divers things in special are submitted without such conditional conclusion, the arbitrator may make award of any of them. 8 Rep. 98. Hill 7. Jac. in Bafpool's Case.——2 Brownl. 310. Freeman v. Bafpoole S. C. and S. P. accordingly.

[6. If a submission be to the award of J. S. &c. upon all the premises or any part thereof, in this case J. S. may make an award of any parcel only. 39 H. 6. 11. b.]

[7. If the submission be of all controversies between &c. *ita quod &c.* the award ought to be made of all controversies of which they have consufance, or otherwise the award is void. M. 5 Ja. B. between Middleton and Wikes, per Curiam.]

[8. But upon such general submission with an *Ita quod &c.* if the arbitrators make an award of all controversies, of which they have consufance, and not at others of which they have no consufance, yet the award is good, because without information of the parties they cannot take consufance thereof. M. 5 Ja. B. between Middleton and Wikes, per 3 justices against 2.]

[9. If the submission be special, as of such a thing and such a thing &c. *ita quod &c.* the arbitrators ought to make an award of all things so specially named, or otherwise the award is void, for they ought to take notice of those which are mentioned in the submission without other information. Mich. 8 Ja. B. between Middleton and Wikes, per Curiam agreed.]

10. Where a submission is general of all actions &c. without any condition of *ita quod* the award be made &c. in such case, because generale nihil certi implicat, it may stand well with the generality of the words, that there was but one cause in controversy between the parties, and therefore an award made of one thing shall be good, per Cur. 8 Rep. 98. a. Hill. 7 Jac. in Bafpool's Case.

11. Where a submission is to the award of J. S. with a bond for performance, and the submission is with an *Ita quod* they do arbitrate

The plain-  
tiff and de-  
fendant sue.

*arbitrate de & super præmissis*, in such case they must make their award of all matters, or else the award will be void for all. For by the Ita quod it is intended by them to have a final end of all matters; and so the difference is where the submission is in such special manner with bonds to perform the same, and where the bonds are only to perform quoddam arbitrium; per Coke Ch. J. 2 Bulst. 40. Mich. 10 Jac.

mitted to an award of all differences between them; in assumption the defendant pleaded in bar, that the

plaintiff was indebted to him in 4l. for his fees &c. and that before any award made the defendant offered to prove it to the arbitrator, and desired he would allow it in his award, but he made an award without any consideration of this 4l. tho' he had notice and proof thereof; and upon demurrer it was argued that this plea was ill, because it did not appear that the submission was conditional with an Ita quod &c. for in such case the arbitrator cannot make an award of part of the differences when he had notice that there were more, but when the submission is not conditional, an award for part, tho' he had notice of more, is good for that part; but if it should be admitted that this submission was conditional, yet this award is good, because the arbitrator had awarded that the parties should execute mutual releases, and that makes it final; and of this opinion was the Court, and likewise admitted by Saunders of counsel on the other side; but for a fault in the declaration judgment was given for the defendant. Saund. 32. Mich. 18 Car. B. R. Birks v. Trippet.—Sid. 303. pl. 10 S. C. but S. P. does not appear.

12. Award was, that the defendant should pay to the plaintiff 5l. towards his charges at law, and the apothecary's bill, and other his charges; it was objected, that this is not final, but is only for part of the charges, and if so, then the plaintiff may proceed against him for the rest; sed non allocatur; and the Court said, [ 79 ] that the words (towards his charges) shall be taken in satisfaction of all charges. Lutw. 530. 533. Trin. 10 W. 3. Onions v. Cheefe.

## (M) What shall be an Award of all.

[1.] If the submission be of all actions personal, ita quod arbitrium fiat de præmissis before Easter, and the award is made before Easter de & super præmissis, that one shall pay to the other 20l. at Midsummer next ensuing, and that then the one shall release to the other all actions personal in satisfaction of all matters personal between them, this is made super præmissis, for by this it is intended that the release shall be only of actions till the submission, and not till Midsummer. M. 5 Ja. between Goffe and Brown, per Curiam adjudged. Hobart's Reports 258. same Case.]

Hob. 190. pl. 237. Goffe v. Brown, S. C. adjudged. Hobart says, the reason must be either because (de & super præmissis) may import

a restraint to the things submitted, or else that no new causes shall be supposed except they were alleged, (as in pleading of awards of causes they do not aver that these were all) or else, that the award of all causes may be reasonably understood all causes submitted, being joined to De præmissis, and that therefore a release made should be a good performance of the award.

—Mo. 885. pl. 1242. cites S. C. as adjudged. Trin. 5 Jac. C. B. Rot. 1608.—S. C. cited All. 26.

[2. If the submission be of all matters between the parties, and the award is made of all præter one obligation, and of this the award is that it shall (\*) stand; this is a good award of all, for he is not bound to discharge this without cause, and it shall be intended there was no cause. Hill. 14 Jac. between Berry and Penrin, at Serjeant's Inn adjudged, and judgment was affirmed there in a writ of error accordingly.]

Cro. J. 399. pl. 8. S. C.

\* Fol. 257.

and judgment affirmed, and all the justices

tices and barons held this a sufficient declaration of their purpose concerning all controversies, and no disclaimer to meddle with any. Mo. 849. pl. 1154. Barrey v. Perin, S. C. but S. P. does not appear.—Bridgm. 90. Perryn v. Barry, S. C. and judgment affirmed.—3 Bulst. 62. Berry v. Perry S. C. but S. P. does not appear.—Ibid. 69. [but wrong page 67.] Perry v. Berry S. C. & S. P. and judgment affirmed in Cam. Scacc. and held that they could not have made a better award thereof to have this stand and be in force.—Roll Rep. 375. pl. 31. S. C. but I do not observe S. P.

Where an award was that (they excepted certain bonds &c.) this is as much as to say, They award that they shall stand in force, which is a good award, and therefore it was adjudged for the plaintiff. Cro. J. 277. 278. pl. 8. Pasch. 9 Jac. B. R. Sailows v. Girling.—Bulst. 123, 124. S. P. accordingly in S. C.

[3. If A. and B. submit all controversies of woods and underwoods, and all quarrels and suits between them, *ita quod* &c. and the award is that A. shall have the underwoods, and that he shall pay to B. 50l. and says nothing of the woods, but awards further, that all manner of actions, quarrels, &c. between them shall cease, this is a good award of all, because the beginning of the award was (we do award of the premisses) and also the award is of all actions &c. ergo. Mich. 5 Jac. B. between Humfrey and Wiburtn, per Curiam.]

See (B) pl. 4. 21.—  
(C) pl. 3.  
—(N) pl. 1.  
S. C. and  
the notes  
there.

[4. If a submission be of all matters, actions &c. between them, *ita quod* fiat de præmissis, and the award is that one shall make a certain release of all actions, which is void, because it comprehends more time than was submitted, and that he shall pay a certain sum of money, and awards also of the other part, this is a good award for the money, though the award be void for the release. My Reports 14 Jac. Vanlore and Tribb adjudged, for though the award is to release all actions, yet it does not appear by this that any actions were between them.]

Cro. E.  
858. pl. 26.  
Barnes v.  
Greenwell  
S. C. the  
submission  
was of all  
quarrels &c.  
stirred and  
depending  
until the  
day of the  
date of the  
bond, which  
was the 4th,  
and the  
award was  
of all mat-  
ters to the 3d. And the Court held it well enough; for (now depending) cannot be, unless they had been in suit before the 4th day, because it cannot be said to be begun and depending all upon the same day.

[5. If 2 submit all controversies the 4th of May to the award of J. S. *ita quod* arbitrium fiat de præmissis, and J. S. makes an award de præmissis of all controversies till the 1st of May, though here he hath not made any award for part of the time submitted, but the award is shorter, yet because it is made de præmissis it shall not be intended there were any mean controversies between them between the 1st of May and the 4th of May, unless this be shewn of the other part, and therefore the award is good enough. Trin. 44 El. B. Rot. 1447. between \*Barnes and Green adjudged, Hill. 15 Jac. B. between †Ley and Pains, which was agreed per Curiam, and the same term, which was also agreed in B. R. per Curiam, between ‡May and Samuel. Vide the Case cited Hobart's Reports 258.]

\* Hob. 190. pl. 237. S. C. cited by Hobart Ch. J. that the award was one day short of the submission, and judgment being given for the plaintiff a writ of error was brought, but what issue it took he knew not.—S. C. cited by Doderidge and Haughton J. 2 Roll Rep. 1. —Ibid. 193. S. C. cited Arg.—S. C. cited Mo. 885. pl. 1242.—Hutt. 9 Arg. cites S. C.—Cro. C. 216. pl. 1. Arg. cites S. C. † Mo. 885. pl. 1212. Lea v. Paine, S. C. adjudged.—Hutt. 9. Leigh v. Paine, S. C. adjudged.—S. C. cited 2 Roll Rep. 193.—S. C. cited, and says the record was shewn of the judgment. Hob. 191. in pl. 237. —S. C. cited as adjudged All. 26.—See (N) pl. 3. S. C.—See (B) pl. 24. and the notes there.

[6. If a condition be of all controversies, doubts &c. had, made, moved or stirred between the parties from the beginning of

of the world until the day of the date of the bond, and the arbitrators award that one shall pay 10l. to the other, which appears by his confession that he hath received, and if it shall appear within one month, and due proof thereof shall be made that he hath received more than this which he hath so confessed, then he shall pay that also; though this last part be void, yet the award is good, though it was objected that all doubts are referred, and the condition is *Ita quod fiat de præmissis*, and so they have not made an end of all doubts, for it appears the arbitrators doubted of this whether more was due or not, but per Curiam adjudged good, because it is not averred that this was a doubt moved or stirred between the parties at the time of the submission, for perhaps this doubt arose between the arbitrators after the submission, and it shall not be intended without an averment that this was a doubt at the time of the submission, and this was made in *majorum cautelam* by the arbitrators. Hill. 10 Car. B. R. *Jeanes and Fourth*, per Curiam adjudged in a writ of error upon a judgment in banco, and the first judgment affirmed accordingly. *Intratur Mich. 9 Car. B. R. Rot. 470.*]

7. An award was made general of all controversies indefinitely without any limitation, and adjudged good; and in this case the arbitrement will not discharge any action which was not submitted, [as perhaps a trespass &c. done afterwards] and then it is only surplusage, which shall not avoid the award, tho' the plaintiff hath more recompence by the arbitrators, in respect that the defendant shall be discharged of trespasses until the making of the arbitrement. Hutt. 9. cites *Trin. 5 Jac. Hilton v. Brown*.

8. Submission was by R. and S. of all controversies concerning a wine-licence, and the arrears of certain rent out of land, and the arbitrators reciting 15l. to be due to R. make an award that S. shall pay 7l. 10s. to R. in satisfaction of part of the said 15l. and shall assign the wine-licence to R. without saying that it was to be in satisfaction of the residue; so that 7l. 10s. parcel of the debt, remains unsatisfied. Roll was of opinion that this is a void award, as to the assignment of the wine-licence. But Bacon held that it should be intended in satisfaction of the other 7l. 10s. But both agreed, that the submission not being with an *Ita quod* &c. the award as to parcel was good; and so judgment for the plaintiff. All. 51. Pasch. 24 Car. B. R. *Rose v. Spark*.

9. An award recited that there were several differences between plaintiff and defendant concerning a house and divers elms and arrears of rent, and that they, to make a final end of all, award the defendant to pay the plaintiff 4l. for all the said arrears of rent. Defendant demurred, for that this is an award only of one part and not of all differences, but adjudged for the plaintiff; for they held this award mutual, because the words (for the arrears) signify (in satisfaction of the arrears) and they are thereby discharged, and though the award recites other matters, yet it shall be intended that they were otherwise determined, or at least the award saying (to make an end of all differences) shall

Award was to pay the plaintiff 40l. which he had done; the plaintiff in his replication set forth the award in hæc verba, by which it was recited, that there had been

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be

great dealings between the parties, and that the plaintiff

be intended that the 4l. was in satisfaction of every thing, the others not appearing but by the recital of the award itself. Lev. 132. Trin. 16 Car. 2. B. R. Hopper v. Hacket.

had paid to the defendant all his just demands, and that there remained due to the plaintiff 40l. which the defendant had not paid, tho' he was awarded to pay it; and upon demurrer it was objected, that this was an award on one side, for it was only that the defendant should pay the plaintiff 40l. but adjudged, that because the award recited dealings between them, and that the plaintiff had paid all that was due to the defendant, and then ordered him (the defendant) to pay 40l. to the plaintiff, it shall be intended that this was to be in satisfaction of the debt due from the defendant to him. Lutw. 541. Trin. 11 W. 3. Elliot v. Cheval.

10. An award that the parties shall give mutual releases, is an award for both parties of both sides, and shall bind; per Cur. Freem. Rep. 51. pl. 62. Mich. 1672. C. B. Anon.

3 Keb. 253. pl. 80. Vesque v. Daniel, S. C. adjudged for the plaintiff.

11. An award that the defendant pay to the plaintiff 10l. and that each should make the other good releases. The words (good releases) shall be intended releases according to the submission, and that makes it an award of both parts; and judgment for the plaintiff. Freem. Rep. 356. pl. 450. Mich. 1673. Vezy v. Daniel.

12. In a Quantum meruit for work done, the defendant pleaded an award that the plaintiff should accept a bill of sale of such a ship; but the award said nothing that the defendant should deliver it, and therefore exception was taken to it; for that nothing was awarded to the plaintiff. And Holt Ch. J. held that this is no bar to the plaintiff, nothing being awarded to be done by the defendant in satisfaction. Ld. Raym. Rep. 612. Mich. 12 W. 3. Clapcott v. Davy.

13. Award was, that defendant pay to the plaintiff 50l. and thereupon the plaintiff to seal a release to him of all actions &c. touching the premises. It was objected, that the release of actions &c. touching the premises, should be taken to relate only to the 50l. and not to the actions &c. submitted; but the Court held, that it should be taken to relate to the controversies; and judgment accordingly. 2 Ld. Raym. Rep. 898. Trin. 2 Ann. Anon.

14. Award was, that the defendant pay to the plaintiff 21l. and that the plaintiff should deliver up to the defendant such a bond (being the matter then in controversy) to be cancelled, and that the plaintiff and defendant give one another mutual releases to the day of the date of the said bond. In debt on the submission-bond the plaintiff had verdict and judgment in C. B. Error was brought in B. R. and Holt Ch. J. held the award good; for the bond awarded to be delivered up, was the foundation of all the controversies between the parties, and nothing else appears to have arisen since, and consequently the awarding the bond to be delivered up to be cancelled, and a general release to the defendant to the day of the date of that bond, will end all controversies between them. Powell J. held, that the award was mutual and final if the release was left out of the case; and judgment affirmed. 2 Ld. Raym. Rep. 1141, 1142. Pasch. 4 Ann. Bell v. Gipps.



(M. 2) Construction of Awards.

1. **A**RBITREMENT is to be *taken* according to the true meaning of the parties, notwithstanding the words do inforce it otherwise; per Haughton J. Arg. 3 Bulst. 64. in Case of Berry v. Perry, cites 5 Rep. 103. Trin. 43 Eliz. C. B. Hungate's Case.

2. If there be any *contradiction in the words* of an arbitrement, so that the one part cannot stand with the other, the first part shall stand, and the other be rejected; but if the latter be but an *explanation* of the former, there both parts shall stand; per Doderidge J. Arg. 3 Bulst. 66. Trin. 13 Jac. in Case of Berry v. Perry.

3. Arbitrement is in nature of a judgment and sentence, in which there ought to be plainness, and no collection of the intent of the arbitrator. Brownl. 92.

4. It was agreed to be a *stated rule* in awards, that are said to be *de & super præmissis*, that if the words used in them are in their own nature *more comprehensive* and extensive to things not within the submission, yet they shall be intended that there was no other matter between the parties for them to lay hold on but what was submitted, if the contrary be not shewn. So e converso, if the words are *more narrow* than to take in all the matter of submission, yet it shall be intended that no more was in controversy than what the words naturally comprehend, if the contrary be not likewise shewn. 6 Mod. 232. Mich. 3 Ann. B. R. in Case of Knight v. Burton.

1 Salk. 75. pl. 17. S. C. but S. P. does not appear.

5. The *books* are growing *less and less nice every day* in the construction of awards; per Raymond Ch. J. Gibb. 270. Pasch. 4 Geo. 2. B. R. in Case of Philips v. Knightly.

(N) In what Cases an Award shall be *void in Part*, or in all.

Fol. 258.

[1. **I**F 2 submit the 1st of May all controversies between them, and an award is made that one shall make a release of all controversies till the time of the submission [award,] which was the 4th of May, this award is void in the whole, because the release which is to be made *comprehends more time than was submitted*; for perhaps there were other controversies between them between the 1st of May and the 4th, and the release is intire, and therefore being void in part, it is void in the whole. My Reports, 14 Jac. B. R. between \* Vanlore and Tribb, adjudged. Co. 10. † Moor and Bedell, 132. adjudged.]

\* Roll Rep. 437. pl. 2. S. C. Doderidge J. took a diversity, when an action is brought upon the award, and where upon the bond; for in the last Case,

if the bond be with Ita quod fiat de præmissis, and the one part is void, all is void, and that he had known several judgments accordingly; and Crooke of counsel said that he agreed to this, where it appears that there are several actions depending besides those whereof the award is made, because there it appears that the award is not made de præmissis; but in the principal case, though the award is to release all actions, yet it does not appear that there

there were more actions whereof the award was not made, and cited 24 Eliz. MALLVARD'S Case. And by Montague Ch. J. if he bound himself to perform all things contained in the award, he ought consequently to perform so much as is good, tho' part is void; and judgment was given accordingly per Cur. prater Doderidge, who said nothing, but seemed as if satisfied with the diversity put by G. Crooke; for he said nothing after.—Bridgm. 18. Vandlore v. Dribble, S. C. and agreed per Cur. that the award was good for all that was submitted to, and void for the rest; and the breach being assigned in a matter submitted to, gives a sufficient cause of action to the plaintiff; and judgment accordingly.—S. C. cited per Cur. as adjudged accordingly. All. 87.—Heath's Max. 52. cites S. C.—See (B) pl. 4. 21. S. C. (C) pl. 3. S. C. (M) pl. 4. S. C.

† Gouldsb. 91. pl. 4. Trin. 30 Eliz. in Cam. Scacc. Bedel v. Moor, S. C. & S. P. agreed by all the justices; but because this was an error not moved before, they gave the defendant in error a further day.—Le. 170. pl. 238. Bedel v. More S. C. in Cam. Scacc. but S. P. does not appear.—Jenk. 264. pl. 67. S. C. & S. P. adjudged erroneous. But says, understanding this Case that there was no averment taken by the defendant, that the other controversies were between the days.—S. C. cited Bridgm. 58.—Sid. 154. pl. 4. Mich. 15 Car. 2. B. R. Rous v. Nun. The award was, to release at a day future to the submission; and the Court held it good notwithstanding, be ause if any thing new had happened after the submission, it should be shewn of the other side, and if there had it is only void pro tanto.—See (C) pl. 3. S. C.

\* 2 Roll Rep. 1. Mawe v. Samuel, S. C. adjudged.—Poph. 134. S. C. adjudged.

[2. But in these cases it appears to the Court, that *by this release the obligation or assumpsit by which the other was bound to perform the award, should be released*, which are not within the submission. Hill. 15 Jac. B. R. between \* May and Samuel, adjudged upon a demurrer, for the said reason. Mich. 24 Car. B. R. between † Kinniston and Jones, agreed per Curiam.]

† All. 86. S. C.—Sty 97. Keniston v. Jones, adjournatur.

Submission was, of all matters between them till the 16 day of March 18 Jac. and the award was, that each of them should release to the other all matters &c. till the 16 day of March &c. It was objected that by this release the bond, upon which the action is now brought, was discharged; but it was ruled a good award; for tho' it be void as to that part, yet it shall be good for the rest. Winch. 1. Pasch. 1. Jac. C. B. Norton v. Lakins.

Debt upon bond for performance of an award. Upon Nullum arbitrium pleaded the plaintiff replied, and set forth an award, that the defendant should pay the plaintiff 10l. presently, and give bond to pay 10l. more on the 27th of November following. and to sign general releases now; and upon demurrer it was objected that the award was void, because mutual releases then given would discharge the bond. Sed per Cur. it shall discharge only such matters which were depending at the time of the submission. 3 Mod. 264. Mich. 1 W. & M. in B. R. Rees v. Phelps.—Sec (O) pl. 3.

\* All 85. S. C. but not very clear as to this point.—Sty. 97. S. C. adjournatur.

† See (M) pl. 5. S. C. and the notes and references there.—Hob. 191. in pl. 237. cites S. C. as adjudged; but Hobart Ch. J. says that if the defendant had paid the 20s. and the plaintiff

[3. But if 2 submit the 1st of May all matters between them, and the award is that one shall pay to the other 20s. in satisfaction of all matters between them till the time of the award made, which was the 4th of May, though this comprehended more time than was submitted, yet because it shall not be intended there were any matters between them in issue between the submission and award, unless it be shewn of the other part, the award is good. Mich. 24. Car. B. R. between \* Kinniston and Jones, per Curiam. Hill. 15 Jac. B. between † Ley and Pain, adjudged. The Reporter thought this is good law, but that this is not the reason of the case, altho' the Court relied upon this; for this crossed the reason of the judgment supra; for the award is void, because there may be other mean controversies; but it seems the reason of this case is, for that although there were other matters mean between the submission and award between them, and so the award for these matters void, yet here is no intire act to be done, as in the case supra of the release, but the said 20s. continues a good satisfaction of the other matters submitted; and all the inconvenience is, that peradventure the money to be given was increased for the mean matters, and so he was at some prejudice, but there is no prejudice

judice on the other part; in this case a precedent was cited to be Hill. 43 El. B. Rot. 2079. between *Goodwin and Fountain*, which was adjudged in point. Vide accordingly Hill. 42 Eliz. [ 84 ] B. R. between *Beckingham and Hunter*, adjudged.] bad accepted it, ac-

it would have satisfied and discharged any trespass &c done by the defendant to the plaintiff between the date of the bond and the award, because it might be averred a satisfaction for it. according to the award,

Submission was to stand to the award of J. S. of all matters and controversies depending between them. The award was made *de & supra præmissis*, viz. That all actions and controversies between them should cease, and the one to pay to the other 4s. Exception was taken, that the award was of controversies depending at the day of the award, and which is more than is submitted. But it was resolved (absente Anderson) to be good, and tho' it seemed to extend to more than the submission, yet the words (*de præmissis*) restrain it to the thing submitted, and judgment accordingly. Cro. E. 861. pl. 37. Mich. 23 & 44 Eliz. C. B. Goodman v. Fountain. S. C.——S. P. and the award adjudged good; for the Court shall not conceive any new controversy, and the rather because it was pleaded to be *de & super Præmissis*, which carries an intendment proportionable to the submission. All. 26. Mich. 23 Car. B. R. Gurman v. Hill.

[4. Upon a submission by A. & B. of all suits between them, concerning certain tithes, if the award be that A. shall pay to B. such a sum of money, and that B. shall suffer all suits to be discontinued which he hath against A. where he hath against A. other suits which do not concern the said tithes, by which the award is void for this, yet the award is good for the rest, for this is not so entire as a release. Trin. 18 Jac. B. R. between *Ingram and Webb*, adjudged.] Roll Rep. 362. pl. 15. Pasch. 14 Jac. B. R. the S. C. but the pleadings being ill, a replader was awarded by consent.

2 Roll Rep. 192. Trin. 18 Jac. B. R. the S. C. & S. P. agreed by all the judges.——Palm. 107. *Ingrave v. Webb*, S. C. says the award was to release all actions; but adjudged accordingly, and affirmed Hill. 20 Jac. in Cam. Scacc. by all the justices of C. B. and barons of the Exchequer, in error brought.——Cro. J. 663. pl. 15. *Webb v. Ingram*, S. C. in the Exchequer Chamber, Hill. 20 Eliz. and judgment affirmed by all the justices and barons.

[5. If the submission be of all matters depending, and the award is, that he shall not prosecute any action depending or arising till the award made, where there are mean actions depending between the submission and the award, by which the award is void for these, yet the award is good for those which are submitted, because this is not so entire, but that this part of the award which is good may well be performed. Trin. 8 Jac. B. R. between *Sayer and Sayer*, adjudged.]

[6. If the submission be of all matters depending &c. and the award is, that one scilicet A. shall pay to the other scilicet B. 1000l. at such days, (\*) &c. and awards further, that all actions, controversies, and matters in difference whatsoever between the said parties, shall immediately cease, determine, be void, relinquished and die between them; and it is further awarded, that each party shall make general releases of all matters and demands between them, till such a day, which by admittance comprehends the obligation of submission, yet altho' this award be void as to the release, because if it should be made, it would release the obligation of submission, yet the award is good, in as much as there is an award of both sides, præter this, scilicet the payment of the 1000l. and also that all matters between them in controversy shall cease, which is good, and so the award of both parts, and recompence to them. Mich. 24 Car. B. R. between *Kinnaston and Jones*, adjudged upon a special verdict. Intratur Mich. 23 Car. Rot. 587.]

All. 85. S. C. adjudged.   
 \* Fol. 259.   
 — Sty. 97. S. C. adjournatur.   
 — An award was made 30th of August, that the one should pay to the other 40s. in recompence of all trespasses, at such a day and

and place, if the other would come there in person to receive it, and that the one should release them and there to the other all actions and demands, to the day of the date of the award: it was adjudged, per tot Cur. a good award for the first part, but void for the last part, and that he ought to perform the first part. Cro. E. 809. pl. 12. Hill. 40 Eliz. B. R. Nuby v. Sabb.——S. C. cited Hut. 9.

[85] (6.) If the award be void in part for the *unreasonableness* or *impossibility*, yet that which is reasonable is good.]

\* Br. Arbitrement, in pl. 51. cites S. C.—For *sureties*, tho' this is void as to the *sureties* for the unreasonableness, yet this is good to bind the party himself. \* 19 E. 4. 1. † 18 E. 4. 23.]

twice; contra if they award that he shall be bound by the counsel of the other, note the diversity. Br. Arbitrement, pl. 51. cites 18 E. 4. 22, 23.——Ibid. in pl. 39. cites S. C.——S. C. cited 2 Roll. Rep. 192.——Palm. 108. Arg. cites S. C.

† Br. Arbitrement, pl. 51. cites S. C.——Ibid. in pl. 39. cites S. C.——2 Roll. Rep. 192. Arg. cites S. C.——Palm. 108. Arg. cites S. C.

An award was to pay the plaintiff 100*l.* or to procure A. a stranger to be bound to the plaintiff for payment of 12*l.* a year to the plaintiff for his life; the Court held that the award as to the last point was merely void, but as to the payment of the 100*l.* the same is good, and shall bind the parties, and the plaintiff had judgment to recover. Le. 304. pl. 424. Trin 29 Eliz. C. B. Wilmer v. Oldfield.——Ow. 153. Oldfield v. Wilmore, S. C. & S. P. admitted; and by Anderson and Peryam, tho' the defendant had caused A. the stranger to be bound, the obligation is broken, because as to this part it is merely void.——Sav. 120. pl. 189. S. C. & S. P. admitted.

An award was, that the defendant should give bond with sufficient surety, to pay the plaintiff a certain sum of money, and in assumpsit assigned for breach, that the defendant did not become bound to the plaintiff modo & forma, as it was awarded; adjudged that tho' the award was void as to the finding surety, yet it was good as to the defendant, and the breach well assigned that he did not become bound, and the modo & forma refers to himself only, and not to the surety. 2 Lev. 6. Pasch. 23 Car. 2 B. R. Coke v. Whorewood.——2 Saund. 337. pl. 56. S. C. adjudged accordingly.——See (B) pl. 5. (E) pl. 4. (F) pl. 2. and the notes at those several places.

Cro. E. 432. pl. 40. S. C. Popham held the award void; because it being an entire thing appointed to be done, and being void in part, is void for the whole; but as to this point none of the other justices spoke.——S. C. cited Arg. Hutt. 9, and says, Quære, if it be not good as to the husband.

[8. If the arbitrators award, that one shall make an assurance of certain land, within the submission, to the other and his wife, where the wife is a stranger to the submission, and therefore the award is void as to her, yet the award is good for the rest, for he ought to make the assurance to the party the husband. Mich. 37, 38, El. B. R. between Samon and Pitt, for this may be severed.]

S. C. cited by the name of Barnes v. Fairchild. 3 Mod. 272. Arg.

[9. If A. & B. submit themselves to certain arbitrators, touching the title of certain land, and the arbitrators award that all controversies touching the land shall cease, and that B. shall pay to A. 8*l.* and that A. his wife, and son and heir apparent, by the procurement of A. shall pass to B. such assurance of the land as B. shall require; and awards further, that one of the arbitrators promises to repay 20*s.* part of the 8*l.* to B. upon payment thereof to A. if A. does not repay it. This award is void in the whole, for A. is not bound to procure his wife and son to pass any assurance of the land, they being strangers to the award, and it may be that the wife and the son have the estate of the land in them, and it was intended that they should pass their estate, and this was the consideration, that 8*l.* was awarded to be paid by B. to A. and therefore the award is void in the whole, though

though there be other considerations of both parts in the award. P. 13 Car. B. R. between *Barney and Fairchild*, per Curiam adjudged in arrest of judgment, after a verdict for the plaintiff A. who had brought an action upon the case for the non-performance of the award, and had assigned for breach that B. had not paid the 8l.]

[10. If there be a submission to the award of J. S. of *all matters till the submission*, ita quod fiat de præmissis, and thereupon an award is made at a day after the submission, that one shall make a general release of all matters till the award, and that the other shall pay 10l. tho' there be an award of both parts, præter the release which is void, yet the award is void in the whole, because it was intended that the release should be part of the consideration. Trin. 16 Car. B. R. between *Munday and Smith*, per Curiam adjudged as I conceive the case, quære thereof.]

11. An arbitrement *made in the night* is good; for it is a [ 86 ] judicial act, and personal attendance is not necessary, and notice may be given to the party any other day after. Cro. E. 676. pl. 5. Trin. 41 Eliz. B. R. *Withers v. Drew*.

12. An award was made *that the defendant should convey such lands to the plaintiff for life, remainder to J. S. a stranger in fee*; the Court held that tho' the award was void as to the stranger, yet it was good as to the particular estate for life, and ought to be performed. Cro. E. 758. pl. 27. Hill. 42 Eliz. *Bretton v. Pratt*.

13. Award was that a stranger, viz. one of the arbitrators should enter bond, and after that the plaintiff to release all actions; it was objected that the award was void, and that by such release the bond would be released, and that a void award is no award; the Court admitted the award void as to the bond to be entered into by the arbitrator, and also as to the extinguishment of it by the release; but they conceived that the arbitrement consisted of two matters, which were distinct and might be severed; for tho' it be void as to one matter, yet it shall be good as to the other; and Forster J. held that the award to make the release might be severed, viz. that it should be good for all actions except the bond; but Coke e contra and said, that it is so entire that it cannot be divided; but the Court conceived, that the award was good as to the bond to be made by the defendant, altho' it were void as to the arbitrator. Godb. 164. pl. 230. Pasch. 8 Jac. C. B. *Pits v. Wardal*.

14. An award to pay money, and to do several other things, and amongst the rest, that the now plaintiff should pay G. W. 6s. 8d. for drawing and engrossing the award, it was objected, that the whole award was void, because G. W. was a stranger to the submission, and that this is a thing agreed on after the submission; agreed that it was void as to that, but yet it was good for the residue. Bridgm. 91, 92. Mich. 14 Jac. *Perryn v. Barry*. Cro. J. 399. pl. 8. *Berry v. Penning*, S. C. — Mo. 849. pl. 1154. *Barry v. Perin*, S. C. — Roll Rep. 227. 275. S. C.

3 Bult. 62. S. C. but I do not observe S. P. in any of the said books.

15. Debt was brought upon an obligation to perform an award, which was good in part, and void in part, and the breach assigned upon the good part, and the award was to pay money, but *no time of payment*, and afterwards it was demanded; the award is good. Brownl. 53. Pasch. 19 Jac. Rayson v. Winder.

S. P. agreed, Lat. 60, 61. Pasch. 1 Car. Norwich (Bishop) v. Cornwallis.

16. An award made the same day that the bond of submission is entered into is good; per Doderidge J. who said it had been so adjudged, and he held that if the arbitrator makes the award before, and publishes it after, it is sufficient. Lat. 14. Mich. 2 Car. Anon.

—Jo. 67. pl. 3. S. C. & S. P. admitted. —The submission was that the award be made 6 days after the submission; if the award be made the same day on which the submission was, it is a good award; for the day of the award is to be taken inclusive and not exclusive; per Roll. Ch. J. Sty. 382. Pasch. 1653. Clark's Case.

Lat. 207. Stone v. Knight, S. C. not adjudged. —Noy. 93. S. C. but no judgment. —S. C. cited by Mallet J. Mar. 142.

17. An infant submitted himself to an award (as the Court held he might) and money was awarded to be paid him at several times, and that upon the last payment he should release; it was moved, that if he should not be of age at such time, that part of the award which was to be performed by him [viz. the release] is void, and consequently the other part is so also; and of this opinion was the Court prima facie, and therefore advised the plaintiff to discontinue or move it again. Jo. 164. pl. 2. Mich. 3 Car. B. R. Knight v. Stone.

and ibid. 144. by Brampton Ch. J. who said, that it is a case of no authority, because no judgment was given; but that all in that case agreed, that the award was void, because of the release to be made by him, which proves that the submission was also void; for if that be good, by the same reason the release would be so too; and whereas in that case it was objected, that it should be voidable at the election of the infant, he said that the submission ought to be either absolutely good or absolutely void, the end of an award being to compose controversies, and the arbitrators are judges to determine them, which should never be done, if the infant might make good or frustrate the arbitrement at his election; and therefore to say that it shall be conditional, is against the nature of an arbitrement, and to say it shall bind the infant absolutely cannot be, and to say that it shall bind the one and not the other is unequal; besides there can be no election in this case; for if he were within age nothing binds him, and if at full age he ought to perform it. —S. C. cited, 3. Lev. 17, which was debt on bond of submission, that if the obligor and J. B. his son (an infant) shall each perform the award of A. B. and the defendant pleads that his son is within age; the Court delivered no opinion, if submission by an infant, or by the father on behalf of the infant, be void; but they held clearly that the submission of the father for himself is good, and that they may make an award between him and the plaintiff only. Pasch. 33. Car. 2. C. B. Bowyer v. Borkfidge.

[ 87 ]

18. It is impossible for 3 men to make arbitrement by word of mouth, because it cannot be jointly pronounced, but it must be in writing in such case, and the pronouncing by one and agreement by the other is not sufficient. Clayt. 17. August 1636. by Damport J. Lawson's Case.

19. The condition of the bond of submission is an entire thing, and therefore if it is void in part, in respect of one of the parties who submits himself &c. it is void against the rest; as for instance, where an infant and 2 more submit themselves to an award, the bond was void as to the infant, and shall be so likewise as to the rest; agreed by Brampton Ch. J. Heath and Mallet J. Mar. 111. pl. 189. Trin. 17. Car. Rudstone v. Yates.

20. Where an award consists of several parts, and one of those parts

parts was to pay 5*l.* to the poor of the parish of D. which was not within the submission, and so not good; yet Roll Ch. J. held, that if it be void as to that, it is good as to the rest; because it is perfect as to the ending all differences between them which are submitted, and judgment nisi &c. 39. Trin. 23 Car. Terry v. Baxter.

21. An award in the first part of it was, that all suits and controversies shall cease, and tho' in the whole award after nothing is well awarded but of one part only, yet the Court agreed that it is a good and mutual award upon the first part only. Lev. 158. Hill. 13 & 14 Car. 2. C. B. Harris v. Knipe.

22. An award was confirmed in part and made void in part. 1 Chan. Cases 40. Hill. 14 Car. 2. Bishop v. Bishop.

23. An award was, that the plaintiffs should release to the defendant all demands to the time of the submission, and that the defendant should release to them all demands to the time of the award. The Court held, that tho' that part of the award as to the defendant's release to the plaintiffs was void in law, because it over-reaches the submission, yet because there were other matters awarded on both sides which were good, the award was sufficient. Hardr. 399. Pasch. 17 Car. 2. in the Exchequer, Joyce v. Haines.

24. Submission was of all actions, ita quod the award be made at or before 23 Jan. but if the arbitrators shall not agree upon their award, then they shall choose and elect an indifferent man, and they shall stand to his final end, determination and judgment, which he shall give and determine under his hand and seal, that then this obligation shall be void &c. The umpire awarded the defendant to pay money to the plaintiff. It was objected, that the condition being, that the arbitrators shall choose an indifferent man, and (they) shall stand to his award, so that (they) must mean the arbitrators and not the defendant, and therefore is void and insensible, and so that the defendant is not bound to perform it. But adjudged per tot. Cur. that the condition is good enough as to this matter, tho' it be not very properly expressed, and that the defendant had forfeited his bond by not performing the award of the umpire; and judgment for the plaintiff. Saund. [ 88 ] 65. Pasch. 19 Car. 2. Butler v. Wigg.

25. Where the satisfaction awarded to one is made any part of the consideration of his paying money, or doing something for the other, and if by the award itself he hath no possibility of having or recovering that satisfaction, there the award being void as to that part, is void in the whole. Nelf. Abr. 241. pl. 14.

As for instance, in an action on the case for work done, the defendant pleaded an award,

by which he was to pay to the plaintiff what was due to him for task work and day work, and that the plaintiff should pay to the defendant 2*l.* and that upon payment of that money the parties should execute mutual releases; and then he averred, that the whole work came to 12*l.* 10*s.* and no more, which he had paid to the plaintiff. It was agreed on all sides, that the first part of this award was void, because it was uncertain how much should be paid for the work, and therefore it was held that the other part of the award for the plaintiff to pay 2*l.* was likewise void, for it plainly appeared that the arbitrators intended him something for the work he had done, which part of the award being void for uncertainty, the other part must be so likewise, for otherwise the plaintiff must pay 2*l.* and have no manner of satisfaction for the work he had done, because after he had paid the money he was to give the defendant a general release, and then he could never have any satisfaction for his work; for where an award is to a man to do a thing, and one of them is void, it shall stand void. Vol. III.

good for the other, as if W. R. is awarded to pay 10l. to L. R. and 5l. to H. S. who is a stranger to the submission, the award is void as to him, but it is good to L. R. because it plainly appears that 10l. and no more was awarded to him, and he can be at no prejudice if the 5l. is not paid to the other. Nelf. Abr. 241. pl. 14. cites 2 Saund. 292. [Hill. 22 & 23 Car. 2.] Pope v. Brett.

But where the award was, that money should be paid at 2 several days, and releases given, so that it appears by the very method

and order of the award, that the general releases were not to be given till after the money paid, the Court were clear of opinion that it was well enough, and so judgment was given for the plaintiff. 2 Mod. 170. Hill. 28 & 29 Car. 2. C. B. Adams v. Adams.

26. If an award be, that defendant should pay the plaintiff two sums at several times, and that several releases shall be given presently, it was objected, that by giving such releases the bond and money would be discharged, and therefore the awarding the release was void against the plaintiff, and so there is nothing of his side to be done; and of that opinion were all the Court. 2 Mod. 169. Hill. 28 & 29 Car. 2. C. B. Adams v. Adams.

27. If two things are awarded, one within the submission and the other not, this last is void, and the breach must be assigned only on the first. And if there is a submission of a particular difference, and there are other things in controversy, and a general release is awarded, it is ill, and those other things in controversy must be shewed on the other side to avoid the award for that cause. And also if the submission be of all differences till the 10th Day of May, and a release is awarded of all differences till the 20th day of May, if there are no differences between the two days the award is good, but if there are any it must be shewed in pleading, otherwise the Court will never intend any; held per Cur. 2 Mod. 309. Trin. 30 Car. 2. C. B. Hill v. Thorn.

2 Lutw. 1597, 1600. S. C. the Court held the award good as to the 50l. and that it was mutual, but as to the time and place of the submission and acknowledgment of the offence, they were of opinion that it was not good; but because, as had been insisted, it was only a circumstantial thing and not any judicial act, the plaintiff had judgment.

28. Debt upon bond for performance of an award; the defendant pleaded no award made; the plaintiff replied and set forth an award, which was, that the defendant should pay the plaintiff 50l. and ask his pardon in such manner and place as the plaintiff should appoint, and that then each party should execute mutual releases; the Court held this ill; for the arbitrator was to determine, and not to make the plaintiff judge in his own cause, and tho' the time and place are but circumstances, yet in this sort of satisfaction they make the most considerable part, and therefore the award was held void as to this. 1 Salk. 71. pl. 5. Trin. 10 W. 3. C. B. Glover v. Barrie.

[ 89 ] 1d. Raym. Rep. 114. S. C. and ibid. 115. Powell J. took this difference, that if the arbitrators make an award of mutual re-

29. The bond of submission was dated 2 July, 7 W. 3. in an action of debt; the defendant pleaded no award made; the plaintiff replied, and shewed an award that the parties should sign mutual releases to each other of all demands until the 12th of August following, and upon demurrer to this replication it was objected, that the whole award was void, because the arbitrators had exceeded their authority, for they were only to arbitrate about all matters between the parties to the date of the bond of submission, and they had awarded releases to be executed above 6 weeks afterwards,



terwards, which they had not power to do; but adjudged, that tho' that part of the award concerning the releases might be void, yet it does not follow that the whole award should be so too, because it may be void for one part and good for another. Nelf. Abr. 242. pl. 19. cites 1 Lutw. 520. Marks v. Marryott.

leases generally, this will relate only to the time of the submission, and this will be well e-

nough; but if they award general releases to be executed until the time of the award made, this will be ill, because it exceeds the submission, and will release the bond of submission itself and all mesne acts, and warrant this difference; and he cited Hill. 16 & 17 Car. 2. C. B. Rot. 501. r Keb. 434. But by Treby Chief Justice it has been held in such case that the submission bond shall be intended to be excepted, but nevertheless, in the principal case they held the award good enough and reciprocal, because the plaintiff was to pay 30l. to the defendant, and the defendant to surrender the possession of the house to the plaintiff, so that no fault in the releases will vitiate it, and therefore judgment for the plaintiff.

30. Till king James the First's time the law was held all along, that an award void in part was void in toto, but then, as it appears in Hob. and Hutt. that an award might be void in part and good in part; per Holt Ch. J. 12 Mod. 534. Trin. 13 W. 3.

I.d. Raym. Rep. 715. S. P. by Holt Ch. J.

31. A difference is taken where the thing to be done on one side is only applied to one particular thing of the other side; there tho' the award be void in other parts, it may be good in that part, scus where a particular thing of one side is applied by the award to all that is to be done of the other side, if any of those things be ill awarded the award cannot be good for the rest. Per Powell J. 12 Mod. 587. in C. B. Mich. 13 W. 3. in Case of Lee v. Elkins.

32. And if an award were that one of the parties with his wife and son join in a conveyance to the other, and the other pay him 100l. that award is good as to a conveyance to be made by himself, and if that only had been awarded for the 100l. it had been well; but sure such award would be wholly void, for the other was to have had a title made to him from the party, his wife and son, and it would be unreasonable if it were that one should be obliged to pay his money and not have such title made to him as the arbitrators designed. Per Powell J. 12 Mod. 587. Mich. 13 W. 3.

33. It has been often resolved, that if an award be void in part, as being only *ex parte*, yet if it be mutual for another part it shall be good for that part, per Powell J. and he cited 10 Rep. 131. b. OSBORN'S CASE, where if an award be of some matter within the submission, and for that void as to that part, and though it appears by the award that it designed both should be recompence of what is to be done of the other side, yet if there be ever so small a matter to make it mutual, it shall stand for the matter within the submission; but he said, that this was durus sermo, and that that judgment was after reversed upon a writ of error, and that the rule put there will not hold to the extent which Coke gave it. 12 Mod. 587. Mich. 13 W. 3. in C. B. in Case of Lee v. Elkins.

Tho' an award may be void in part and good for the rest, yet this must not be when it is void in that part that concerns the justice of the award; per Parker Ch. J. in delivering the opinion of the Court.

10 Mod. 204. Hill. 12 Ann. B. R. in Case of Barnardiston v. Foulyer.

34. One recovered 90l. damages in waste, and then the matter [ 90 ] is submitted to reference; and it is awarded that the defendant

should at one time pay 10*l.* to the plaintiff, and that at another da be should pay him 15*l.* and that for payment thereof another and the defendant should become bound in a bond; this being good in part, tho' void for the rest, was held good; but Powell J. who cited the case, said sure that was hard, and would not pass at this day. 12 Mod. 587. Mich. 13 W. 3. in Case of Lee v. Elkins.

35. *Submission of all differences, ita quod &c.* The award was, to pay to the plaintiff 12*l.* 15*s.* at or upon the 2d day of February &c. and to deliver 3 boxes and several books, and assigns the breach that the defendant had not paid the money secundum formam arbitrii. Resolved that the award as to the books is uncertain, unless it had been said that they were in the boxes; and this being upon a conditional submission, the whole award is likewise void. Lutw. 550. 554. Trin. 13 W. 3. Cockson v. Ogle.

36. An award of a covenant to indemnify against the acts of a third person, and the costs and damages therein is void. Arg. admitted. Gibb. 270. Pasch. 4 Geo. 2.

## (N. 2) Void by Misrecital.

1. *SUBMISSION* is of all suits depending in controversy after 7 Jac. and before 9 Jac. The award recites the submission of all things depending before the 7 Jac. and that he made award de præmissis, and therefore it was objected not to be good. Quod fuit concessum per Coke Ch. J. Roll. Rep. 362. pl. 15. Pasch. 14 Jac. B. R. Ingram v. Webb.

Sty. 97.  
Kynaston  
v. Jones,  
S. C. and  
the misre-  
cital was of the date of the obligations of submission, by the arbitrators in their award.——Vent.  
184. Hill. 23 & 24 Car. 2. B. R. Toll v. Dawson, S. P. and the Court held clearly, that it did not  
hurt the award.

2. *Misrecital* of the arbitrators does not prejudice their award. Agreed. All. 87. Mich. 24 Car. B. R. in Case of Kynaston & Spencer v. Jones.

3. The bond of submission was, *Ita quod it be made before or upon the 22 Dec. or to chuse an umpire.* The arbitrators made no award, but chose an umpire, who made an award, reciting that the parties submitting had bound themselves to his award. Exception was taken hereto, because it is not true. Sed non allocatur, because it is only recital. 2 Mod. 169. Hill. 28 & 29 Car. 2. C. B. Adams v. Adams.

(O) *How to be made. When the Submission is Ita quod fiat de Præmissis.*

Fol. 260.

See (B) per totum.

[1.] If an award be made *de & super præmissis*, and the condition is *Ita quod fiat de præmissis*, and the award is, that one shall make a general release to the other of all matters till the award, and that the parties shall be friends, and loving, this is good; for the award is void as to matters after the submission, and therefore he is not bound to make any release of them, but of those only which were before the submission; also inasmuch as it is averred that the award was *de et super præmissis*, it shall be intended that there were not any other matters. Trin. 8 Car. B. R. between Raimond and Popely; and in another case between Popely and Popely, upon demurrer adjudged; but the Court gave judgment, and principally because the money was awarded to be paid by one, and the breach is assigned upon this, but nothing was to be done of the other part but to make the release; and so an award but of one part, if the award as to the making of the release be not good; but nota, it is awarded that the parties shall be friends.]

\* See (B) pl. 23. and the notes there.

[ 91 ]

Submission was of all suits and demands &c. between the parties, so as the award of and upon the premisses be ready to be delivered to them &c. before the feast of St. B. &c. Upon nullum arbitrium

trium pleaded the plaintiff replied, and shewed an award made *de & super præmissis*, viz. that the plaintiff should have a horse then in controversy, and that the defendant should pay him 3l. before Michaelmas next, and should release to each other all matters between the time of payment; and Michaelmas. In debt on the bond, the breach was assigned in not paying the 3l. It was adjudged for the defendant; for tho' it was pleaded that the award was made *de præmissis*, yet the words of the submission being general, it is not good, unless the plaintiff helps it with an averment that there were no more matters between them; and then the release directed being void, there is nothing arbitrated for the defendant's benefit. Cro. J. 352. pl. 6. Mich. 12 Jac. B. R. Stain v. Wild. — S. C. cited 3 Lev. 188. per Curiam, in Case of Robinet v. Cobb.

[2. Mich. 1 Car. B. R. between Franklyn and Emlyn, in an action upon the case for non-performance of an award. Per Curiam, such award is good for the cause aforesaid; and I do believe it was adjudged accordingly. Intratur Hill. 10 Car. Rot. 1275.]

[3. But Mich. 13 Car. B. R. between Durbant and Venn, which intratur Trin. 13 Car. Rot. 1063. If the submission be by obligation, dated 17 Nov. 11 Car. to be made before February after, and the award is made 27 January, that the defendant shall make a release of all actions &c. till the award; and in debt upon an obligation for non-performance of this award, the breach is assigned in not making of a release, and it is averred that no other matter was between them, yet this is no good breach, because if he should make this release, it would release the obligation of submission. Adjudged per totam Curiam upon demurrer.]

See (B) pl. 23. and the notes there. See (N) pl. 2.

[4. If a condition be to stand to the award of J. S. *ita quod fiat de præmissis &c.* and the award is made, that A. shall pay to B. the other party 20l. two months after the award, and upon payment thereof each of the parties shall make a general release, the one to the other, to the time of the payment; this is a good award, though it comprehends

more

more time than was submitted; for when the money is paid, then there is an end of the submission and all, and so no prejudice, tho' it releases the obligation or promise of submission. Dubitatur M. 14 Car. B. R. between *Atroke and Orwel*, this being moved in arrest of judgment, and the postea staid thereupon.]

See (B) pl. 23. and the notes there.

[5. [S2] Upon such condition of submission, if the award be, that A. should pay to B. the other party 10l. in satisfaction of all actions, suits, and accounts that B. may have against A. for any matter till the award made; and that all suits then depending, or that thereafter should depend between them, for any matter from the beginning of the world till the award made, shall cease; this is a good award, tho' it comprehends more time than was submitted, scilicet, till the award made, which was after the submission; for without shewing thereof it shall not be intended that there were any matters between the submission and award. M. 23 Car. B. R. between *Lerwyn and Hills*, adjudged. Intratur P. 23 Car. Rot. 99. upon demurrer.]

[ 92 ]  
Fol. 261.

[6. If the condition be to stand to the award of J. S. of all suits, controversies and debates, except a certain obligation by name &c. \* *ita quod fiat de præmissis*, and after J. S. makes an award of all demands, which comprehends the obligation excepted, and therefore all the award is void. P. 14 Car. B. R. between *Deely and Bud*, per Curiam, adjudged.]

S. C. cited Arg. 2 Ld. Raym. Rep. 962. award was that one should pay to the other 10l. at a day subsequent, and that he should give the other a bond for payment of the money accordingly,

[7. If the condition be to stand to the final end of J. S. *ita quod fiat de præmissis*, and the award is made concerning an obligation, in which one is bound to the other that the obligee shall not prosecute, or cause to be prosecuted, any suit against the obligor upon the said obligation, this is a good award, tho' it was objected that this award is not final; for this award does not extinguish the duty, but it is only awarded that he shall not sue upon it, and if the duty is not extinguished it may be forfeited by outlawry; but this is a good award; for this award shall be taken according to the use in such award, scilicet, to extinguish the duty, and therefore it is good. Tg. 14 Car. B. R. between *Milwood and Stokes*, adjudged upon a demurrer. Intratur Tr. 13 Car. Rot. 756.]

within 4 days, and that all prosecutions and suits should cease till failure of performance. This was held to be final; for if he paid the money &c. the award was absolute, and the cessation perpetual, and he shall not take advantage of his own non-performance. 2 Ld. Raym. Rep. 962. Arg. cites it as adjudged Pasch. 11 W. 3. B. R. Ball v. Hefcott.

[8. If three persons, scilicet, A. B. and C. of the one part, and D. of the other part, submit themselves to the award of J. S. *ita quod* &c. and he makes an award between A. and B. of the one part, and D. of the other part, and makes no award between C. and D. this is not good, because the submission is conditional, and it is recited in the submission that there were divers controversies between them all; for this differs from the case in \* 2 R. 3. 18. b. because there the submission is not conditional. M. 14 Car. B. R. between *Harris and Painter*, per Curiam, Croke and Bark, no others being present. Intratur H. 13 Car. Rot.]

\* See (D) pl. 5. and the notes there.

9. Submission was of all actions and controversies, *ita quod the award*

*award be made by such a day.* An award was, that the defendant deliver certain apparel &c. to the plaintiff. The plaintiff brought an assumpsit, and adjudged it does not lie, because the arbitrement being conditional, with an *ita quod* &c. it ought to have been made for all quarrels &c. according to the submission; but if the submission had been general without such clause, then the arbitrator had had absolute authority; and in such case, if the award had been made but of part, it is good for that part, and ought to be performed. Noy 62. Pasch. 39 Eliz. Smith v. Woodstock.

10. Award more large in time than the submission is good, and *diversity* was taken by the Court between a particular thing submitted as *such trespass, ita quod*, &c. for there it ought to be answered by the award and between general submission, for there *de præmissis* is good. Sid. 252. pl. 21. Pasch. 17 Car. 2. B. R. Manning v. Warren.

11. An award was, that the defendant should release to the plaintiff to the time of making the award. It was objected, that this would discharge the bond of submission; sed non allocatur; because divers things are to be done together, and if all had been done the release would be no prejudice, and differs from the case where money is to be paid after the release is to be given; and judgment for the plaintiff. Raym. 169. Mich. 20 Car. 2. B. R. Barker v. Durrant.

12. Bond to stand to an award *so it be made by Hilary term; the term is discontinued*; the award ought to be made by the usual time of the term. Comb. 103. Pasch. 1 W. & M. in B. R. Anon.

## (P) Umpirage.

[ 93 ]

[1. IF a submission be to the award of certain arbitrators, and if they cannot agree, or are not ready to deliver their award in writing before the 1st of May, then the submission is made to J. S. to be the umpire, to be made before a certain day after; if the arbitrators do not treat of the matter, so that there is no disagreement between them, yet if they do not make any award before the day, the umpire may make an award upon this submission; for the words (and if they cannot agree) are not to be taken literally, but as if they had been (\* if they do not agree upon any award.) H. 15 Ja. B. R. between Lumley and Hutton adjudged upon a demurrer.]

if they do not agree and make their arbitrement in writing [&c. as the case is] before such a day. See Cro. C. 226. pl. 3. Mich. 7 Car. B. R. Taverner v. Skingle.

[2. If a submission be to stand to the award of certain arbitrators, and that if they disagree, then to the umpirage of J. S. ita quod the award or umpirage are made before the 1st of May; in this case the umpire cannot make any award till a disagreement made

2 Roll. Rep. 268. pl. 44. S. C. but S. P. does not appear. — Cro. J. 447. pl. 27. S. C. but S. P. does not appear. — \*The words (if they do not agree) have the intendment,

S. C. cited 2 Vent. 115. — S. C. cited Sid. 455. per Cur. —

S. C. cited Arg. 2. Saund. 130. but *ibid.* 131, 132. it was argued by Saunders, that if in this case the arbitrators would meet before the time lapsed, and disagree, and declare their disagreement, the umpire after this, and within the time, may make his umpirage, and it will be good, as may be collected from the same book, which says, that he cannot make his umpirage till disagreement of the arbitrators, for this implies, that after their disagreement he may do it within the time limited, but that if the arbitrators defer their disagreement to the last instant of the time, then is the power of the umpire merely void as the book says, viz. by this matter *ex post facto*, but the submission was good at first, and might have taken effect in the umpirage, and the said book does not imply the contrary.

Godb. 241. pl. 334. S. C. adjudged accordingly, per tot. Cur. — S. C. cited Arg. 2. Saund. 132.

Submission was of all actions &c.

\* Fol. 262.

unto 4 persons, and the umpirage of a 5th, and the assumption was mutually to stand to and perform the order of them 5.

The 4 persons, and the 5th as umpire, made the award, and the party refused to perform it. The whole Court held the award good and pursuing the submission; but that it had been otherwise if they had been divided in the submission, as if it had been, that if the 4 could not agree, then

[ 94 ] the submission to be to the umpirage of a 5th, for then the 5 could not all join together in making the award; but the submission being here to 4, and to the umpirage of a 5th, they may all 5 well join in the award, and so the award here being made by all 5 is clearly good, and according to the submission, and ought to be performed. Bull. 184. Pasch. 10 Jac. Anon.

Submission was to perform the award which A. B. C. and D. with the umpirage of W. W. should make touching and concerning &c. so as the same be tendered or ready to be delivered in writing &c. at or before to-morrow at 12 o'clock &c. In debt on the bond the defendant pleaded nul award, and the plaintiff replied, that on the same day (of submission) the said arbitrators and umpire made an award of the premises so and so, setting it forth. Upon demurrer it was insisted, that the condition is repugnant, that the arbitrators together with the umpire should make an award, for that it is a contradiction that they and the umpire too should make it, because an umpire is a judge by himself and cannot be an arbitrator. But nothing appears more than the argument of the counsel for the defendant. Hard. 43, 44. Hill. 1655. in Scaccario.

Sty. 133. Mich. 24. Car. Wood v. Clemeace,

[3. If two submit themselves to two others with such a clause, nevertheless if they do not end it within 10 days, they shall nominate another that shall end it within the 10 days, and after they cannot agree within the 10 days, by which they appoint another who makes an award within the 10 days, this is good, because it is the appointment of the parties and their special agreement, and by making the umpire the authority of the arbitrators determines. Mich. 11 Jac. B. between Fyal and Varier adjudged.]

[4. If the condition of an obligation be to stand to the agreement of A. and B. being arbitrators chosen for that purpose, to end a controversy between the said obligor and obligee, and J. S. being umpire for (\*) both parties &c. in this case, if A. and B. who are the arbitrators make an award without J. S. this is a good award, for though the words are in a manner *prima facie* uncertain, yet because the common usage is to limit an umpire to make an end if the arbitrators cannot, it shall be so interpreted, and that the words (J. S. being umpire) shall be taken as an affirmative per se that he is an umpire. Mich. 12 Car. B. R. between Osborn and Roydon adjudged per Curiam in a writ of error upon such judgment in the Court of Kingston upon Thames. Intratur Hill. 12 Car. Rot. 513.]

[5. If A. and B. submit themselves by condition of an obligation to the award of J. S. *ita quod* the award be made upon or before the last day of May next ensuing, and if he does not make any award

*award upon or before the said last day of May, then if they stand to the award of such person who shall be elected by the arbitrator to be umpire, to be made before the 10th day of June after, in this case, if the last day of May the arbitrator, not having made any award, elects an umpire, who makes an award before the 10th day of June, this is a good umpirage; for though the arbitrator had all the last day of May to make his award, yet he might the same day elect an umpire when he perceived that he could not make any award himself, and when it appears after that he relinquished and did not make any award after the naming of the umpire.* Mich. 24 Car. B. R. between *Watson and Clement* adjudged per Curiam. Intratur Hill. 22 Car. Rot. 803.]

S. C. but S. P. does not fully appear; but upon demurrer it was objected, that it appears by the pleading that the umpire was chosen before he ought to be, for that it appears

not that the arbitrators could not agree in making the award &c. but Roll Ch. J. thought the exception not material; & adjournatur—Ibid. 136. S. C. but S. P. does not at all appear; adjournatur.—Ibid. 152. S. C. adjudged for the plaintiff nisi, but S. P. does not at all appear.

Where there were 4 arbitrators chosen, who were to make their award to deliver in writing on or before the 21st of July, and if they could not agree, then to such umpire as they should name, so as the umpirage be made before the 25th of July following. The arbitrators made no award on or before the 21st of July, but on the 18th of July 3 of the arbitrators, and to which the 4th agreeing on the 21st of July, by their writing dated the 18th of July nominated J. S. umpire, who before the 25th of July made an award super præmissis; resolved, that here was no complete nomination till the agreement of the 4th arbitrator with the other 3, viz. on 21 July, and the writing is not to have effect till that time, and is no writing by intendment till sealed, tho' it be dated before. And if they had nominated the umpire before the time expired of making their arbitrement, yet it is good enough when no arbitrement is made by them within the time; and judgment for the plaintiff. Cro. C. 263. pl. 10. Trin. 8. Car. B. R. *Jennings v. Vandeput*.—S. C. cited 2 Sauad. 133. in a Nota.—S. C. cited by Twisden J. Mod. 275.

If arbitrators chuse an umpire before the time allowed for their award be expired, it is ipso facto void, tho' they absolutely resolve to make no award themselves. 1 Salk. 70. pl. 2. Pasch. 9 W. 3. B. R. *Reynolds v. Gray*.—12 Mod. 120. S. C. & S. P. agreed, that they cannot chuse an umpire till after the day for making their award.—Ld. Raym. Rep. 222. S. C. & S. P. by Holt Ch. J.—S. P. & S. C. cited, and the Court said they were satisfied that the umpirage might be maintained, not only upon the case in 1 Salk. 70. 1 Le. 32. and Raym. 21. cited, but also upon the authority of this case in Roll's Abr. and 2 Jo. 167. 2 Barnard. Rep. 154. Trin. 5 Geo. 2. Cowell v. Waller.

[6. If the condition of an obligation be to stand to the award of J. S. and J. D. so as the award be made and delivered to-morrow, and if they cannot then agree, then to stand to the umpirage of J. N. so he makes and delivers the umpirage to-morrow or next day after that (which was Thursday), in this case tho' it be alleged that the arbitrators could not agree upon any award, and that they denegassent & deferruissent to make any award, yet the umpire cannot make his umpirage upon the morrow, for that altho' the arbitrators could not agree, and though they have deferred it and denied, yet at any time after during the said day, they might have made an award, and the words are (if they cannot then agree), by which is intended all the day till the last moment thereof, and this is a condition precedent to the power of the umpire, which extends to all the day, and no act of the arbitrators can hasten this beyond the power, and if the arbitrators and umpire also should have power at the same time, and both should make two several awards, this would bring great doubt and confusion to the Court, which of them would be good. M. 1651. between *Barnard and King*, adjudged per totam Curiam upon a demurrer. Intratur P. 1651. Rot. 661.]

Sty. 306. S. C. adjudged nisi. —S. C. cited Sid. 455. pl. 25. per Cur. and Twisden J. said, he was in Court when the case was adjudged, and that Roll was then of another opi-  
[ 95 ]  
nion, and contrary to what he reports here; for he took the law as reported, viz. that they cannot have concurrent

rent jurisdiction.——Mod. 275. S. C. cited by Twisden accordingly, and said, that he knew that Roll did then hold that if it had been alleged that the arbitrators had wholly deserted their power, it had let in the umpire, so as that he might account [award] within the time allowed to the arbitrators, and he stood then upon this, that it was implicitly alleged, viz. postquam denegasset &c. but Twisden says, that this was a hard opinion of his, and that he himself here reports his own judgment otherwise, and says, that it may be he altered his opinion.——S. C. cited Arg. 2 Saund. 130, 131.——S. C. cited by Twisden J. Lev. 174, 175. 285.——See Denavam v. Mafcall, Twisleton v. Travers, and Mitchell v. Harris.

Debt upon bond for performance of an award of J. S. and J. N. *so that they make it before or upon the 1st day of July, and if not, then to the umpirage of J. D. so as he make it on or before the 2d day of July.* The arbitrators made no award, but J. N. made his umpirage on the 1st day of July; and upon demurrer it was objected, that it was made before the time allotted by the submission, because the arbitrators had all the whole day, (viz.) the 1st day of July, to make their award, and cited the Case of Roll Abr. 262. pl. 6. sed per Curiam, this umpirage is good, for the parties have expressly given the umpire the 1st day for executing his authority; and they did not think the reason of the resolution of the case cited to be of any force, viz. that the Court would be in confusion to adjudge which should be good in case the arbitrators and the umpire had made several awards; for the award of the arbitrators, if they had made any, should be adjudged good, but if they had not, then the umpirage should bind, and there would be no confusion upon concurrence of authority as to the time; for the umpire had not an absolute but only a conditional concurrence, viz. if the arbitrators make no award within the time, and they thought the case in Roll. Abr. was not good law. 2 Jo. 167, 168. Mich. 32 Car. 2. B. R. Case v. Dare.——2 Show. 164. pl. 154. Dare and Chafe v. Chafe, S. C. per Cur. accordingly.

In this case the arbitrators shall meddle with the whole, or the umpire with the whole; for they shall not meddle by parcels.

Br. Arbitre-

ment, pl. 29. cites S. C.——Fitzh. Arbitrement, pl. 13. cites 39 H. 6. 12. S. C. but S. P. does not exactly appear.

Br. Arbitre-  
ment, pl.  
29. cites  
S. C.——

Fitzh. Ar-  
bitrement,  
pl. 13. cites  
S. C. but  
S. P. does  
not exactly appear.

[7. If two men submit themselves for all matters &c. to the award of certain arbitrators to be made before a certain day, and that if they do not make any award before the day, that then they submit to the ordinance and judgment of J. S. If the arbitrators make an award of part of the things submitted, and of part not, the umpire cannot make any award of this part of which the arbitrators have made no award, because he hath no power given but if the arbitrators make no award. 39 H. 6. 10. Curia.]

[8. But if the submission be, that if the arbitrators make no award of the premisses, or of any parcel thereof, that then the umpire shall have power to make an intire award, or of parcel which remains, as the case is; in this case the arbitrators may make an award of parcel, and the umpire of the residue, because this is expressly ordained. 39 H. 6. 11. b.]

2 Keb. 15.  
pl. 75.  
Pasch. 18  
Car. 2.  
Twisleton  
v. Travers  
S. C. ad-  
judged for  
the plain-  
tiff.——  
S. C. cited  
12 Mod.  
513.——

S. C. cited by Holt Ch. J. Ld. Raym. Rep. 671. as resolved that such umpirage so made is good.——S. C. cited 1 Salk. 72 pl. 7. & S. P. adjudged accordingly in all the said books. Pasch.



13 W. 3. MITCHELL v. HARRIS. But a distinction is taken in all those [ 96 ] books, viz. that if the umpire be named in the submission, he cannot make his umpirage before the time given to the arbitrators to make their award in, be expired.

10. Debt on arbitrement where the *submission was to A. and B. ita quod they make the award before Mich and if they cannot agree then to J. S. who then shall be umpire to make the award within the said time.* The plaintiff declares that the arbitrators did not make any award, but that J. S. made his umpirage and shews it; but the umpirage being made within the time allowed to the arbitrators it was adjudged for the defendant. Raym. 187. Pasch. 22 Car. 2. B. R. Copping v. Hurrier. Lev. 285. Copping v. Harriard, S. C. Moreton J. doubted, but the other 3 held it void, but that if the submission had been to the arbi-

trators, and that if they make no award, then to such umpire as they shall name, it might be good, because by their election of the umpire they had waived the submission to themselves, and judgment for the defendant.—Sid. 428. pl. 14. Copping v. Herald, or Hurnard, S. C. and same diversity, by all the justices, but adjournatur.—Ibid. 455. pl. 25. S. C. the Court held the umpirage void, and that there cannot be a concurrent jurisdiction; for then the one may award one way and the other another way. And tho' the plaintiff declared that the arbitrators could not agree, yet this will not aid it; and judgment for the defendant nisi &c.—2 Saund. 129. S. C. adjudged for the defendant after advisement for 2 or 3 terms; and the principal reason was, because the averment in the declaration that the arbitrators non fecerunt nec facere poterunt aliquod arbitrium was not sufficient, and tho' the arbitrators had not, at the time of the umpirage, made any award, yet that did not hinder but that they might either then or afterwards make their award, and so the umpire has made his umpirage before it came to his turn; and the non poterunt is idle, for nothing appears to the Court but that they might have made the award if they would; but true it is, if the plaintiff had shewn to the Court that one of them had been dead, then it would have appeared to the Court that the arbitrators could not make their award; and if the plaintiff had declared that the arbitrators had disagreed as to making the award, and that they had declared they would intermeddle with the award no farther, then per Cur. præter Twisden J. the umpire might well have made his umpirage, but the Case as it appears on the record was adjudged for the defendant by the whole Court.—Mod. 15. pl. 41. S. C. but is only a note.

11. *The arbitrator's power is not absolutely determined by the election of an umpire within the time limited to themselves, unless they absolutely refuse to make any award,* and in such case an umpirage made within the time is void; per Twisden and Morton J. who inclined strongly to this opinion; but Rainsford seemed e contra, & adjournatur. Lev. 302. Mich. 22 Car. 2. B. R. Donavan v. Mafcall. Raym. 205. Denovan v. Mafcall, S. C. adjudged for the defendant; for tho' the arbitrators may chuse

an umpire at any time during the continuance of their power, yet that umpire cannot act till the arbitrator's time is expired, as it is in this case; per Twisden and Rainsford J.—Mod. 274. pl. 26. Delaval v. Mafcall, S. C. The Court inclined (as Twisden says) that the award so made in the principal case was naught, because the authority of the arbitrators was not determined till after the day of the award made by the umpire. It is true, the arbitrators may chuse him upon that day or before, but yet they might still have made an award, and therefore the umpire could not; but adjournatur.—2 Vent. 115. S. C. cited.—S. C. cited 2 Jo. 167. but ibid. 168. the Court conceived the case not to be good law.—S. C. cited Lev. 285.—Per Twisden J. if the arbitrators lay down the business and give it off, yet they may resume it, and make an end when they please, so as it be within their time; and judgment for the plaintiff. Freem. Rep. 378. pl. 492. Mich. 1674. Anon.

12. Submission was to 2 arbitrators, and if they make no award, then to the award of such umpire as they shall chuse. They chose J. S. who refuses. Afterwards they chose W. R. who makes award. The question was, if it was good? For if he that was chose and refused was umpire, then they have executed their authority and cannot make another, but otherwise they Lev. 263. S. C. Pollexfen Ch. J. held it a determination of the power, and that by the plead-

ings it is they may. No opinion was given. Show. 76. Mich. 1 W. agreed, that & M. in C. B. Trippet v. Eyre. they had elected an

umpire, and if so the after election is void. But the other 3 justices contra, and held that *by the refusal, the first election was void and as no election*; that insufficient acts are as no acts, and judgment accordingly.——2 Vent. 113. S. C. adjudged accordingly by 3 judges, who held that this refusal immediately upon his nomination, made it amount to no more than a bare proposal to him, and is to stand for nothing.——5 Mod. 45. Tippet v. Eyres, S. C. adjudged accordingly.

—If the arbitrators, when their time is expired, choose an umpire, *their authority is executed*, and they cannot revoke or choose again, tho' the person elected refuses [ 97 ] to accept; *aliter if they choose their umpire upon condition that he does accept the umpirage*, for then he is not umpire unless he accepts it; per Holt Ch. J. But Rookby doubted whether an express condition would make a difference, because it seemed to be implied. 1 Salk. 70. pl. 2. Pasch. 6 W. 3. B. R. Reynolds v. Gray.——12 Mod. 120. S. C. & S. P. agreed per Cur.——Ld. Raym. Rep. 222. S. C. & S. P. by Holt Ch. J.

13. Umpire by the submission was to make his award *the same day as was limited to the arbitrators*, if the arbitrators did not make theirs; 'tis not good. 2 Vern. 100. pl. 95. Pasch. 1689. Anon.

14. *Submission was ita quod, the award be made by the arbitrators on or before the 21st of May, and if not made before that day, then to stand to the award of an umpire &c.* the arbitrators made no award, but chose an umpire on the 20th of May, who awarded, that the defendant should pay to the plaintiff 40l. before the 11th day of June following; it was objected that they had no power to choose an umpire on the 20th of May, because the arbitrators themselves had power till the end of 21st of May to make their award; sed non allocatur; for the arbitrators not having made any award, the award of the umpire is good; and judgment for the plaintiff. Lutw. 541. 544. Trin. 11 W. 3. Elliot v. Chevall.

15. An award made by the umpire was (amongst other things) *that the defendant should deliver to the plaintiff several goods particularly named, and that if any of those goods should be lost, then the defendant to pay the value of them, to be appraised by the arbitrators and umpire*; it was moved, that the umpire was void, because of the umpire's reserving to himself and the two arbitrators (who were elected to determine the matters before him) to make a valuation of the goods lost or mislaid. Trevor Ch. J. and Blencow held that this was a thing judicial, and not merely ministerial, and therefore the award void; but Powell J. was of another opinion. Lutw. 550. 554. Trin. 13 W. 3. Cockson v. Ogle.

16. Arbitrators not making an award, and having power to choose an umpire, but not agreeing on a person, one naming A. and the other naming B. conclude to determine by *cross and pyle*, whose nominee should stand; the umpirage fell upon B. who made an award; but the Court thought it reason sufficient to set it aside. 2 Vern. 485. pl. 440. Hill. 1704. Harris v. Mitchell:

17. *Submission to 2 and an umpire in case they should differ, the arbitrators meet, and one of them declared himself not clear, the other*

other was for the appellant, upon which the *umpire made his award*. The question was, whether the umpire had any power in this cause, for it was not come to him till the arbitrators differed, which they had not yet, and might still make their award, but the objection was over-ruled. MS. Tab. January 9th, 1721. Middleton v. Chambers.

18. It is settled that arbitrators cannot proceed on a reference, after they have once named an umpire, for then their authority ceases, tho' the time for making the award is not expired. Rep. of Pract. in C. B. 116. Pasch. 8 Geo. 2. Danes v. Monfay.

(Q) In what Cases the Award shall be void for [ 98 ]  
*Uncertainty.*

Fol. 263.

[1. IF an award be uncertain it shall be void, for the arbitrators are judges of the case, and the award *ought to be certain, so that thereby the controversy be decided*, and that for the uncertainty it be not the cause of a new controversy. Co. 5. Samon 78 ]

The award was, that the defendant should enter into a bond to the plaintiff, for enjoyment

of lands, but said nothing of what sum the bond should be; and upon a demurrer by the defendant, it was adjudged against the plaintiff. 5 Rep. 77. b. 78. a. Trin. 37 Eliz. B. R. Samon's Case. —Cro. E. 432. pl. 140. Samon v. Pitt. S. C. adjudged accordingly. —Mo. 359. pl. 489. Sams v. Pitt. S. C. adjudged accordingly. —Hardr. 45, 46. Arg. cites S. C.

An award is in nature of a judgment, and sentence wherein there ought to be plainness, and nothing for the collection of the arbitrator's meaning; for it ought to be his judgment, and not the judgment of another upon his words; per Cur. Yelv. 98. Mill. 4 Jac. B. R. in Case of Martham v. Jemx. —Brownl. 92. Markham v. Jurex. S. C. & S. P. accordingly, but seems only a translation of Yelv. —S. P. Jenk. 340. in pl. 96.

[2. If two submit all matters in controversy between them, and the award is, *that one shall pay the one moiety to J. S. and the other the other moiety cujusdam debiti due to T. S. by two strangers, who were bound to the said J. S. at the request of them two*; this is no good award, because it doth not appear within the award in what sum they were bound, tho' it be averred in the plea after, because it cannot be known what sum they intended. P. 16. Ja. B. R. between Gray and Gray, per Dodderidge and Houghton, but Montague e contra.]

Cro. J. 525. pl. 12. S. C. but S. P. does not appear. —Godb. 275. pl. 389. Gray's Case seems to be S. C. but S. P. does not appear. —See

(E) pl. 6. S. C.

[3. But Houghton inclined that he might have helped it, by an averment that there was not any other obligation beside this &c.]

Where the award was not referred by the arbitrators to

the thing in submission, nor any generality comprehending the thing, but of another matter, the averment of the party that it is all one, cannot expound the intent of the arbitrators. D. 242. b. pl. 52. Mich. 7 & 8 Eliz. —An award shall not be made certain by averment, if it be not certain of itself; as if the submission be of a manor, and an award is made of an acre, and it does not appear within the award that this is a parcel of the manor, and therefore cannot be made good by averment that it is parcel; per Coke Ch. J. quod fuit concessum per Doderidge, but Houghton

Houghton said he doubted of it; but Coke said, that this is Dyer's Case [and seems to intend D. 242. a. b. pl. 51, 52].

An award was, that the defendant should pay the plaintiff 3l. 10s. but it was not said for what; per Hobart Ch. J. this can imply nothing, nor can it be holpen by any averment. But if another action were brought for the trespass, no doubt this award may be pleaded with an averment; he says there was no judgment in this case, for tho' he was, and is clear of that opinion, and the rest concurred, yet there was some varying after, and so it hung, and he thinks it was compounded; for he heard no more of it. Hob. 49, 50. pl. 55. Hill. 12 Jac. Nichols v. Grunnon. See pl. 5.

Cro. E. 432.

pl. 40.

Mich. 37

and 38

Eliz. B. R.

Samon v.

Pitt, S. C.

adjudged

accordingly.

Mo. 359.

pl. 489.

Sams v.

Pitt, S. C. adjudged accordingly. — S. C. cited Cro. J. 315. in pl. 16. per Cur. — S. C.

cited Mar. 18. in pl. 42. per Cur. — Hardr. 45. Arg. cites S. C. — Yelv. 98. Tanfield

J. cited S. P. to have been adjudged. — Brownl. 92. S. P. cited by Tanfield to have been

adjudged. — S. P. per Cur. obiter Lev. 88. Mich. 14 Car. 2 B. R. at the end of

the Case.

[ 99 ]

See pl. 3.

and the

notes there.

[4. If 2 submit all controversies concerning certain land, and the arbitrator awards that one shall enjoy the land, and the other shall enter into an obligation to him, this is a void award, because it does not appear of what sum the obligation shall be, for it shall not be imagined, that he intended an obligation according to the value of the land, and he cannot assign over his power to the parties themselves to assess the sum. Co. 5. Samon 77. b. adjudged.]

[5. If 2 submit all controversies concerning the right, title, and possession of 200 acres of land, called Kelfsom-Linge, and the arbitrators award, that in the waste lands of the town of Kelfsom, one shall have the brakes there growing during his life, paying to the other 2s. per annum, without giving any name of the land in the award, this is a void award, and it cannot be helped by an averment, that the land, where the brakes grow, is the said land called Kelfsom-Linge, submitted, and not other, nor divers, for he cannot expound the intent of the arbitrators. D. 8 Eliz. 242. 52. per Curiam.]

See (K.) pl.

15. S. C.

and the

notes there.

[6. If an award be that one shall pay to the other 6l. 21 May, and 6l. at Michaelmas following, and that the other shall release all his right in such lands *super prædict. primum diem Maii* (omitting *viceſimum*) this is a void award, because there was not any 1st day of May mentioned before. Hill. 4 J. B. R. between Markham and Jennings, adjudged.]

[7. If an award be made between A. & B. touching certain quarters of malt before delivered by A. to B. that B. shall pay to A. so much for every quarter, as one quarter of malt was then sold for, this is a void award, because it is not mentioned in what place the sale should be, for perhaps in one market or place it was sold for more than in another market or place, and therefore the award void for the uncertainty. Mich. 10 Car. B. R. between Hurst and Bambridge, per Curiam upon a demurrer; this award being pleaded in bar of an action upon the case for the malt, but after the demurrer was waved by the assent of the parties. Intratur Hill. 9 Car. B. R. Rot. 1159.]

Cro. C.

441. pl. 5.

S. C. but

S. P. does

not appear.

[8. If an award be that one shall acquit the other of an obligation of 200l. *aut eo circiter*, in which they are bound, for the payment of 150l. *aut eo circiter* to B. this is a good award. P.

15 Car.

15 Car. B. R. between *Barfey and Clipsham*, adjudged per Curiam upon demurrer. Intratur Trin. 14 Car. Rot. 161.] —Jo. 431. pl. 4. S. C. but S. P. does

not appear. —Mar. 18. pl. 42. S. C. & S. P. and the Court held that there was sufficient certainty, because in this case, it lies not in their power to know the direct sum, and a small variation is not material.

[9. If the condition of an obligation be to perform the award of J. S. between A. and B. of all controversies and demands between them &c. and an award is made of the premises, scilicet that A. shall permit B. to enjoy certain leases of certain lands then in his possession, which were the lands of W. S. and then the inheritance of A. he (scilicet B.) paying the rents, and performing the covenants in the leases; and that B. shall deliver the copies of the leases to A. made by the said W. S. and that B. shall pay the arrears of rent due to the said A. after the purchase thereof made. This award as to the payment of the arrears (tho' it be averred that there was 2s. of the arrears of rent then due) is not good for the uncertainty, because it does not appear by the award how much rent was due after the purchase, for B. the lessee does not know when A. the plaintiff purchased the reversion of W. S. nor hath any means to know it, unless A. or W. S. will shew it to him, which he cannot compel them to do. Hill. 1652. between *Massej and Aubrey*, adjudged after verdict for the plaintiff. Intratur Hill. 1651. Rot. 1328.]

10. The award was, that the defendant should pay to the plaintiff 20l. per ann. during the continuance of a lease for years then in being. It was objected that this was uncertain, because the term was not expressed in the award, and this cannot be helped by the averment of the plaintiff what the term was, and how long it was to continue; but adjudged that the payment of the money, referring to the continuance of the lease, is certain enough; for certum est quod certum reddi potest. Nelf. Abr. 244. pl. 3. cites Pasch. 3 Jac. *Girling v. Gosnold*.

pl. 7. cites Pasch. 3 Jac. B. R. Rot. 478.

11. An award was to pay money, but expressed no place where it should be paid. Resolved that in law this should have a reasonable construction, and the party ought to have a reasonable time for the payment; but Foster conceived it not good, because in such case the bond of submission would be immediately forfeited, because there was neither time nor place where the money should be paid. But in answer to this were cited 3 H. 7. and 16 E. 4. where it is said, that if an arbitrator awards that one party shall pay so much such a day, and keeps the award in his pocket till the day be past, yet the bond shall not be forfeited, and so it was adjudged by all the other justices. 2 Brownl. 311. Hill. 7 Jac. C. B. *Freeman v. Baspoule*.

of payment was appointed. The money was afterwards demanded. It was held that the award is good. Brownl. 53. Pasch. 16 Jac. *Rayton v. Windiar*. —Brownl. 65. S. C. and the demand was held good.

Fol. 264.

Sry. 365. 366. S. C. & S. P. and Roll Ch. J. thought the award unreasonable, and the rule was, nil capiat, per billiam, nisi &c.

I do not find this Case in any of the Reports; but it is taken out of

[ 100 ]

Hughes's Abr. tit. Arbitrement, 216.

This Case is in 8 Rep. 97. b. to 99. a. and Cro. J. 285. pl. 1. and Bullt. 144. but I do not observe the S. P. in either of those books.

An award was to pay a certain sum of money, but no time

S. C. cited  
by the name  
of Hine v.  
Rigby,  
Palm. 147.  
by Moun-  
tagne and  
Doderidge  
J.

S. C. cited Arg. Roll Rep. 214.—Jenk. 340. pl. 96. S. C.

12. *Award that defendant shall give security to the plaintiff for payment of 16l. at 2 days, is void for the uncertainty, not shewing what security he should give, whether by bond or otherwise.* Agreed by all the judges and barons; and so a judgment reversed. Cro. J. 314. 315. pl. 16. Mich. 10 Jac. B. R. Thinne v. Rigby.

13. *An award was, that one party should pay to the other so much money as shall be due in conscience; judgment nisi &c. against the plaintiff.* Sty. 28. Trin. 3 Car. B. R. Watson v. Watson.

14. *An infant submitted himself to an arbitrement, and the award was that the infant should pay 1l. for quit-rents, and other small things, and it doth not appear what those small things were; so that it might be for such things for which the infant by the law was not chargeable, and therefore it is void for the uncertainty; per Heath J. and Brampston Ch. J. But by Brampston, if it had appeared certainly that the things had been such for which the infant is by the law chargeable, perhaps it had been good.* Mar. 144. 145. pl. 215. Mich. 17 Car. Rudstone v. Yates.

Raym. 34.  
S. C. but  
S. P. does  
not appear.

15. *The award was, that one shall keep and enjoy the goods, paying so much money to the other.* It was objected that this was void, because they have not awarded that the money shall be paid, but that they shall have the goods, paying &c. But Windham J. held the award good; for tho' it is not expressly to pay, yet it shall be taken according to the intent, which without doubt was, that money should be paid. Sid. 54. pl. 20. Mich. 13 Car. 2. B. R. Stiles v. Trifte.

16. *Award was, that one should pay to the other for task-work, and day-work; but did not mention how much.* This is void by reason of the uncertainty, and the averment that the task-work and day-work amounted to so much, will not help it. 2 Saund. 292. 293. pl. 48. Hill. 22 & 23 Car. 2. B. R. Pope v. Brett.

17. *An award, that a man shall pay so much as such land is worth, is void.* Arg. and agreed by Jones Ch. J. Skin. 248. Hill. 1 & 2 Jac. 2. B. R.

[ 101 ]  
An award  
was, that the  
defendant  
should pay  
to the plain-  
tiff 10l. and  
all the costs  
of a suit  
now de-

18. *An award that the defendant should pay 12 guineas, and all such monies as the plaintiff had expended about the prosecution of such a suit.* It was objected that it was utterly uncertain what the sum will amount to: but the Court held it good; for it may easily be reduced to a certainty, when it is made appear what was laid out in that suit. 2 Vent. 242. Mich. 2 W. & M. in C. B. Hanson v. Leverfedge.

*pending in an inferior Court, and then to give mutual releases.* Per Cur. an award to pay such costs as the master shall tax, is good, because that may be reduced to a certainty; but this is uncertain, and carries it farther than has hitherto been allowed. 1 Salk. 75. Trin. 3 Ann. B. R. Winter v. Garlick.—6 Mod. 195. S. C. and Holt Ch. J. said that it has been held a good award to pay such costs as the probonotary shall tax, and that carries it far enough; but that surely they should either ascertain it themselves, or refer it to a proper officer. And Powell J. said that

that case, referring it to a proper officer of a Court, has been settled on debate; for certum est quod certum reddi potest. Et adjournatur.

An award was, that the defendant should pay 2 thirds of all the plaintiff's costs to his attorney or bailiff, in & circa festam predictam. It was objected to be uncertain; for tho' an award to pay costs to be taxed by the prothonotary has been allowed, 1 Sid. 358. yet here no person is named who is to tax the costs, and therefore an award to pay costs of suit in an inferior Court is void, 1 Salk. 75. and here it is to pay costs to the bailiff, and therefore is like the case in 3 Lev. 413. to pay all reasonable expences in such a suit, which was held to be void. Sed non allocatur; for an award to pay costs in such a suit is sufficient, without saying any thing more; for they may be ascertained. Comyns's Rep. 329. 330. pl. 167. Mich. 6 Geo. 1. C. B. Thomlinson v. Arrikin.——See the Case of Worrall v. Atworth, at (E) pl. 21. and Linfield v. Ferne, at (H) pl. 14.

19. Submission was of all differences &c. concerning a piece of ground used as a wharf; and all erections thereon, which were nuisances to the plaintiff's house. The defendant pleaded no award. The plaintiff replied, and set forth the award; by which it was awarded that the defendant should enjoy the wharf, and that the erections should be pulled down within 58 days from the date of the award; but did not say by whom, nor set forth the date of the award. And upon demurrer it was objected against the replication, by reason of those omissions; but per Cur. the day of the making the award is the day of the date; and by 3 justices, the erections shall be pulled down by him on whose ground they stand; but as to this last point, Holt Ch. J. seemed e contra. 1 Salk. 76. pl. 18. Mich. 3 Ann. Armitt v. Breame. 6 Mod. 244. Arnote v. Bream, S. C. held according-ly.—— 2 Ld. Raym. Rep. 1076. S. C. adjudged by 3 justices against the Ch. J. error was brought in the Exchequer Chamber; but before argument the parties agreed.

Award was to pay 20l. the one moiety in hand presently, and the other moiety within six months after the date of the award. This is good, and shall refer to the time of the award made or given up, altho' without any date; and in this case by the submission they are not bound to make any award in writing, 3 Bull. 311. Mich. 1 Car. B. R. Cable v. Rogers.

## (R) Of what Things they may make an Award. In what Actions it shall be a good Bar.

[1. In an action of debt for the arrearages of an account, an action is no plea, because the debt is certain. 3 H. 4. 4.] Br. Arbitrement, pl. 47. cites 3 H. 4. 5.

that of such arrears found before auditors, arbitrement is no plea; because the debt is now of record, and the plea is only matter in fact.——See pl. 6.

[2. If two submit to a certain debt in controversy between them, the arbitrators cannot make any award thereof, because it was certain before the submission. 2 H. 5. Arbitrement 23. and there it is cited to be 2 H. 5. 2. But this is not in the book at large. 10 H. 7. 4. \* 4 H. 6. 17. b.] \* Br. Arbitrement, pl. 25. cites S. C. In debt upon a contract, arbitrement is

a good plea; per Marten J. Br. Arbitrement, pl. 25. cites 4 H. 6. 17.——Tho' a debt upon a bill or contract cannot by itself be put in arbitrement, yet where one claims 5l. as expences pro diversis negotiis, this may well be put in arbitration, Cro. E. 422. pl. 18. Mich. 37 & 38 Eliz. B. R. Sower v. Bradfield. [ 103 ]

[3. [But] If two submit a certain debt and other things, the  
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were at issue, and then the defendant pleaded ar-  
[ 104 ] damages, which are only in the *personalty* for such wrong or default, an award or accord with satisfaction is a good bar. Co. 6. Blake 44. Resolved.]

[ 104 ] [6. As in an action of *covenant for not doing a certain thing*, as for *not repairing* of a house, or for the *non-delivery* of certain pieces of iron, or such like, an award or accord with satisfaction is a good bar. Co. 6. Blake 43. b. adjudged for not repairing.]  
that the defendant should find a chaplain to the plaintiff for 8 years, and alleged damages that the plaintiff should have the costs of his suit, the arbitrators are not well advised, but it depends yet in their award; judgment *fi actio*. And there it was held, that *arbitrement which lies in averment* is no plea in writ of covenant, which is upon specialty, for arbitrement is no plea against a specialty; but it was not held any default that the arbitrement was not executed. Br. Arbitrement, pl. 11. cites 3 H. 4. 1.

[7. *Contra* 3 Jac. B. R. between *Middleton and Chapman*, adjudged, where it was for the non-delivery of pieces of iron.]

2 Roll. Rep. 187. S. C. adjudged.— [8. Trin. 18 Jac. B. R. between *Rabbet and Stocker*, adjudged upon demurrer, that an *accord with satisfaction* is a good bar of an action of *covenant*, tho' the accord was made before the covenant broke; for this may be in satisfaction of damage to come; and also in the same case adjudged so, where the covenant was broke at the time of the accord.]  
Palm. 110. Roberts v. Stocker, S. C. adjudged.  
[But this case does not belong to this head, but to the head of Accord.]

## (U) [Pleadings. Award, good Plea in what Actions.] In Actions Real [or Mixt].

Br. Arbitrement, pl. 2. cites S. C. & S. P. according; for *detinue* or annuity are actions mixed with the reality, and a man recover the writing or the annuity.—Fitzh. Arbitrement, pl. 3. cites S. C.

[1. AN award is no plea in *detinue of a charter of feoffment*, for this is a thing real, and this action is to recover the thing. *Contra* 9 H. 6. 60. b.]

\* S. P. Arg. Roll. Rep. 270. [2. But *otherways* it is in *trespass for taking the charter*, for this action is only to have damages for it. 9 H. 6. 60. b.]

[3. In an annuity for an *annuity in fee, or for life*, an award is no plea. 9 H. 6. 60. b. (it seems that this is intended by prescription; for if it be by deed, it is no good plea against the deed).]

\* Br. Arbitrement, pl. 14. cites S. C. [4. An award *without writing* is no plea in bar of actions real. 19 H. 6. 37. b. *Contra* \* 11 H. 4. 44. b.]

[5. The *same law* in *actions mixt*, in which the land of an *estate of freehold*, as it seems, shall be recovered. 19 H. 6. 37. b.]

[6. As in an *assise* it is no plea in bar. 19 H. 6. 37.]

[7. The *same law* it is, if the *submission and award* be in writing. 19 H. 6. 37. b.]

Br. Arbitrement, pl. 5. cites S. C. [8. In an action of *debt*, for the arrears of *rent*, reserved upon a lease for years, an award is a good plea in arbr. 4. H. 6. 17. b.]

— See (A) pl. 6. S. C. — See (R) pl. 6. and the notes there.

[9. In



[9. In an action of *waste in the tenuit upon a lease for years*, an award or \* accord with satisfaction is a good bar. Co. 6. Blake 44. Co. 9. Peytoe 78.]

\* See tit. Waste (B. a. 3) pl. 30. and the note there.

[10. Of an action of *waste in the tenuit upon a lease for life*, an accord with satisfaction is a good bar. Mich. 37. El. B. between Sacheveril and Bagnell, adjudged, which intratur Pasch. 36 El. Rot. 959. for this *sounds in the personalty, and damages only to be recovered.*]

[ 105 ]  
Cro. E. 356. pl. 15. S. C. & S. P. resolved per tot. Cur.

but where land is to be recovered in writ of waste, peradventure it is otherwise, and judgment for the defendant.——As to the point of accord, see tit. Waste (B. a. 3) pl. 30. and the notes there. [But that point of accord only does not answer this head of Arbitrement.]

[11. In an *ejectione firme*, an award or accord with satisfaction is a good plea in bar, for tho' the possession is to be recovered, yet this action is *in nature of a trespass*. Co. 9. \* Peytoe 78. resolved per Curiam.]

See (A) pl. 5. contra. — \* Brownl. 133. Pats v. Chitty, S. C. and the plea held good.

——2 Brownl. 128. Peto v. Chacey, S. C. adjudged for the defendant.——Godb. 149. pl. 193. Peto v. Chitty, Mich. 4 Jac. C. B. adjudged a good plea.——S. C. cited Palm. 111. and agreed by all the Court.——[But this is only as to accord, which belongs not to this title.]

## (X) What Award shall be a good Bar of Actions.

[1. IF the award be *to do a thing &c. that the other hath no means to compel him to do*, if the action be brought before it is performed, this is no bar thereof, for then the other should be without remedy, as if the award be *to enter into an obligation, or to find sureties*, he ought to plead in bar that he hath done it. \* 5 E. 4. 7. 17 E. 4. 3. † 19 H. 6. 38.]

\* Br. Arbitrement, pl. 36. cites S. C. —  
† Br. Arbitrement, pl. 21. cites 19 H. 6. 36. Fitzh. Arbitrement, pl. 6. cites Hill. 19 H. 6. 36. S. C. & S. P.

[2. As [So] If two have actions one against the other, of which the days of appearance are several, and they submit, and it is awarded that each shall be non-suit; this award is not any bar of the action in which the first appearance is, because he hath no means to make the other be non-suit in his action, when the day comes. 19 H. 6. 37. b.]

Br. Arbitrement, pl. 21. cites 19 H. 7. 36. — Fitzh. Arbitrement, pl. 6. cites S. C.

[3. So it is not any bar of an action, that it was awarded that he should have an acre of land in satisfaction, if he doth not say he hath made livery thereof to him, because the plaintiff hath no means to compel him to it. 19 H. 6. 38.]

Br. Arbitrement, pl. 21. cites 19 H. 6. 36. — Fitzh.

Arbitrement, pl. 6. cites S. C. and S. P. by Newton.——But it was said, that if [in the cases above] they had awarded the party to be bound by obligation to have done it, this had been a good arbitrement, and good bar if he had been bound accordingly; for this had been an act executed, per Paslon, quod non negatur, and afterwards the plaintiff recovered. Br. Arbitrement, pl. 21. cites 16 H. 6. 36.

[4. In trespass it is no good bar that the arbitrator awarded that each should be quit of trespasses against the other, and the plaintiff

Br. Arbitrement, pl. 3. cites S. C. & S. P. and should

*shall take a release to the defendant, and [should pay to the defendant 20 s. and that after the defendant should release to the plaintiff 20 s. and award that if the plaintiff would perform his part, he should release to the defendant 20 s. this is not any good bar; for if the plaintiff should release to the defendant, he hath no means to compel the defendant to release.* 20 H. 6. 18. b. 19.]

Arbitrement, pl. 1. cites S. C.

5. If any thing be awarded to be paid in satisfaction of an action, this will be a good bar of the action. 46 E. 3. 17. b.]

S. C. but not if it be a form to be admitted.

16. In trespass an award to pay a quart of wine to the plaintiff, and performance, is a good bar of the action. 43 E. 3. 33. 45 E. 3. 16. b. 13 H. 4. 12. 9 H. 6. 50. b. 9 E. 4. 44.]

17. If it be awarded, that he who is supposed the trespasser shall make his law that he is not guilty thereof, he shall be quit of the trespass if he wages his law accordingly; yet this is no bar of the action, because this is no satisfaction, nor can be intended the same trespass of which he hath waged his law. 46 E. 3. 17. b.]

Up on the W. he and Finch was, that it is a good arbitrement; but the book says Quere, because it is a form to be admitted. Fitzh. Arbitrement, pl. 21. cites S. C. in Trespass, and there it is held no plea, because they awarded nothing to be paid &c.

18. An award without a deed of submission or of award, will be a good bar of a trespass. 43 E. 3. 28. b.]

9. In assise it was said, that if two put themselves in arbitrement of land whereof the one has no title, and award be made between them, without writing, that they shall hold in common, this is a good bar in assise. Br. Arbitrement, pl. 30. cites 12 Aff. 25. — Brooke says Quere tamen; for 11 E. 3. 24. is, that partition between privies is a bar; contrary between strangers.

10. In debt the plaintiff counted upon recovery of debt and damages in a Court of Record at Kingston upon Hull, and the defendant pleaded, that they were dismissed by the Court in the same action by assent of the plaintiff, because it appeared to the Court that the parties had put themselves in arbitrement, and therefore to say that he is dismissed, judgment si actio, and it was awarded by the Court, that the plaintiff take nothing by his writ, and so a bar; and per Hank. and Thirn, arbitrement made, or arbitrement pending, and not finished, is a good bar in action personal; and per Hank. so in action real; but Skreene contra. Br. Dette, pl. 61. cites 11 H. 4. 12.

11. Arbitrement that the defendant shall pay 1d. in satisfaction of all manner of actions, which he has paid, is a good bar; per Moile. Br. Arbitrement, pl. 23. cites 22 H. 6. 39.

12. An award, reciting that the defendant has received 20d. and that the plaintiff has done divers trespasses to the defendant, and the defendant has done divers trespasses to the plaintiff, by which it was awarded that the defendant shall pay to the plaintiff 20d. in full satisfaction

*satisfaction of all trespasses, receipts and demands, and that the plaintiff shall be quit against the defendant of all actions and demands, by which the defendant at Dale paid the 20 d. to the plaintiff; judgment &c. and the other said that he did not pay the 20d. prist &c.* Br. Arbitrement, pl. 23. cites 22 H. 6. 39. per Moyle.

13. In debt upon a bill, the defendant pleaded that after the money became due, he and the plaintiff, by parol, did submit themselves to an award, and it was awarded that the defendant pay &c. The plaintiff demurred, because the plea of a submission by parol after the day of payment limited by the bill, is not good to discharge a debt due by specialty. Roll Ch. J. said, that to take away a duty created by bond by parol would be inconvenient, and therefore gave judgment for the plaintiff. Sty. 350. Mich. 1652. Luddington v. White.

14. An award without performance is a good bar to an action on the case for the same matter, if the parties have mutual remedies against each other to compel the execution of the matters awarded; but it is otherwise if they have no mutual remedies to enforce the performance. Carth. 187. 188. Pasch. 3 W. & M. in B. R. Crofts v. Harris. [ 107 ]

15. In case on a special promise by the defendant to deliver hops at such a day &c. The defendant pleaded an award, that the defendant should release to the plaintiff, and that he should release to the defendant all actions and demands whatsoever. Adjudged that this award was no bar to the action on the case, tho' the thing awarded, when executed, would be a bar. And a difference was taken by the Court, that where any thing is awarded in satisfaction, there the award itself is a bar before it is performed; but where nothing is awarded but releases on both sides, there, when the award is executed, the release will likewise be a bar, but not before; for the award without the release is no bar; but per Cur. the defendant may bring his action against the plaintiff for not releasing according to the award, and therein ought to recover all his damages and costs lost in the action against him. Carth. 379. Pasch. 8 W. 3. B. R. Freeman v. Bernard.

For when a thing is awarded to be done in satisfaction, that raises a new duty in lieu of the old one discharged; as if money be awarded to be paid, debt lies for it: but in the case of a release there is only a method ordered to dis-

charge the action; if the award itself discharge the action, there needs no release to be given, because action was gone before; but the action being not discharged till the release comes, till it comes actually it cannot be a bar. Judgment pro quer. 12 Mod. 130. Trin. 9 W. 3, Freeman v. Bernard. —Ld. Raym. Rep. 247. 248. S. C.—1 Salk. 69. pl. 1.

16. Holt Ch. J. said that Nichols's Case amounted to no more than that money paid on a void arbitrement may be pleaded as an accord and satisfaction. 1 Salk. 71. pl. 3. Trin. 9 W. 3. in Case of Bacon v. Dubarry.

17. In indeb. assumpsit and quantum meruit for work done and goods sold and delivered, the defendant pleaded an award that the plaintiff for the work done &c. should accept a bill of sale before made of the 8th part of such a ship, and that the plaintiff and defendant should give to each other general releases. Holt Ch. J. said that this is the same with the Case of FREEMAN v. BERNARD; for as to the goods sold and delivered, there is nothing awarded but

a general release ; that *if the bill of sale had been awarded in full of all demands, it had been good* ; but this release awarded here is not a perfect bar till it be executed. And it having been objected that the goods sold and delivered is the same demand with that for work done, yet Gould J. said that the Court cannot take notice of that upon such a generality ; but that if the defendant had shewn it by *particular averment*, it might have been construed to be within that part of the award. Judgment for the plaintiff. *Ld. Raym. Rep. 611. Mich. 12 W. 3. Clapcott v. Davy.*

18. Case upon three several promises, and an award *ordering mutual releases* was pleaded in bar. *Per. Cur.* 'tis no good plea, because nothing is awarded that bears an action ; but if there were *any thing awarded, for the which an action would lie*, it would be a good plea, tho' it were not performed ; and judgment pro quer'. *12 Mod. 423. Mich. 12 W. 3. Anon.*

19. *Anciently if an award was made to pay a sum, this might have been pleaded in bar, tho' without satisfaction*, because the law gave an action of debt for the money upon the award, and so a remedy ; and tho' that law be now altered, yet now when 2 persons submit to an award, this amounts to mutual promises ; *per Holt Ch. J. 11 Mod. 171. Pasch. 7. Ann. B. R. in Case of Lupart v. Welfon.*

[ 108 ] (Y) Arbitrement and Accord, in what *Actions* they shall be a good *Bar*, and in what not.

*S. e (A) pl. 5. S. C. — See (U) pl. 11. —* [1. **C**O. 9 Henry Peytoe 78. vide in what actions an accord is a good plea.] *See tit. Accord (B) pl. 8, 9, 10, 11, 12.*

The year book is, that the plaintiff imparled.

[2. In a writ of *conspiracy*, an accord with satisfaction is a good plea. *18 E. 4. 24.*]

3. Arbitrement is no bar in *detinue of charters*, for such action is *mixt with reality*. Nor is it any plea in *writ of annuity*, for a man shall recover the annuity. *Br. Charters de Terre, pl. 7. 9 H. 6. 60. per Basington.*

( Y. 2 ) In what Arbitrement and Accord differ.

1. **A**RBITREMENT is good, tho' the *day of payment was to come*, but accord ought to be executed ; for upon arbitrement he may have action of debt ; *but if the arbitrement be, that he shall be bound in an obligation at a day which is to come*, he shall not plead it in action of trespass ; for then the plaintiff shall be barred, and has no remedy to compel the other to make the obligation to him &c. Note the *diversity* between a sum of money and another thing. *Br. Arbitrement, pl. 36: cites 5 E. 4. 7.*

2. **A**rbi-

2. Arbitrement that *each shall go quit against the other*, because that each has done a trespass to the other, is a good arbitrement, for the parties have deputed the arbitrator for their judge; but contra of accord, for this ought to be executed, and there ought to be satisfaction or recompence, & quid pro quo, and therefore debt does not lie upon accord, contrary upon arbitrement; for if the party offers the money upon the accord, and the other refuses it, the accord is void; contrary of arbitrement, for debt lies. Br. Arbitrement; pl. 38. cites 16 E. 4. 8.

## (Z) At what Time it shall be a good Bar of Actions.

[1.] If an award be *to pay money at a certain day, in satisfaction of an action*, if the money be not paid at the day, this award is no good bar of an action, tho' he may have debt upon the award, because it was his own fault that the money was not paid, and therefore he shall not compel the plaintiff to bring an action upon the award, and bar the first action. 49 E. 3. 3.]

[2. But if the defendant *refuses to perform the award at the day*, \* Br. Arbitrement, pl. 12. cites 7 H. 4. 30. b. 11 H. 4. 44. b. 21 H. 6. Arbitrement 10. 22 H. 6. 52. b.]

that the making the award does not of itself extinguish the action.—Br. Trespas, pl. 84. cites 7 H. 4. 30.—Fitzh. Replication, pl. 52. cites S. C. and that by the refusal he was restored to his action.

[ 109 ]

[3. If an award be *that one party shall pay a certain sum of money to the other in satisfaction &c. at a certain day*; in an action before the day of payment, this award shall be a good bar, because he may have an action upon the award. 22 H. 6. 52. b. \* Fitzh. Arbitrement, pl. 14. cites S. C.—Br. Arbitrement, pl. 36. cites 5 E. 4. 7. vide 13 R. 2. Arbitrement 26.]

S. C.—It was admitted that an award not executed, as to pay money, is a good plea where no default is in the party; and so it seems, where the day of payment is not come. Br. Arbitrement, pl. 3. cites 20 H. 6. 18, 19.

In trespas, the defendant said that they put themselves in arbitrement of W.P. of this trespass, and of all quarrels and debates, who awarded, *that the defendant pay to the plaintiff 10s. for amends at Michaelmas next, which day is not yet come*; judgment si actio: and the † plaintiff said that this is no plea, if he does not plead that he has paid, or has been at all times ready to pay; but quære inde. Br. Arbitrement, pl. 5. cites 28 H. 6. 12.

† All the editions of Brook are (defendant), and therefore certainly misprinted.

[4. But if an award be *that one shall enter into an obligation* of 100 l. to the other before a certain day, in satisfaction &c. in an action before the day, this award is no bar, because the other cannot compel him to enter into an obligation at the day. 5 E. 4. 47. 5 E. 4. 7.] \* Br. Arbitrement, pl. 36. cites S. C.—Fitzh. Arbitrement, pl. 14. cites S. C.

[5. If an award be *that one shall pay 10 l. to the other in satisfaction of all trespasses &c.* if he who ought to pay it tenders it at the day, and he [the other] refuses, and after brings an action for the trespass aforesaid, this award shall be a good bar of the action, because

cause it was his own fault that it was not paid, and he *bests his remedy for the money.*]

Br. Arbitrement, pl. 36. cites S. C. accordingly. — Fitzh. Arbitrement, pl. 14. cites S. C. — Arbitrement not execut-  
[6. If A. & B. submit themselves to the award of J. S. of all actions, who awards *that A. shall make an obligation which shall be sealed with wax, and shall bring it to B. and B. shall seal it to A. in satisfaction &c.* If A. does never bring the obligation to B. to seal, yet this award shall be a bar of actions brought by A. which are within the award, tho' he had no means to compel B. to enter into an obligation, because the default was in himself. 5 E. 4. 7.]

ed is a good plea, where no default is in the party. Br. Arbitrement, pl. 3. cites 20 H. 6. 18, 19.

It is no plea *in trespass*, that the parties put themselves in arbitrement &c. by which it was awarded that he should pay 20s. judgment &c. without pleading payment; but per Choke, it is a good plea, if the day of payment be not yet come. Br. Arbitrement, pl. 26. cites 9 E. 4. 51.

7. An award to pay money in satisfaction is pleadable in bar, tho' the other party be not awarded to accept it; for the award of payment of money vests a duty in the party, and is a bar in debt, or trespass, or assumpsit; per Holt Ch. J. 2 Ld. Raym. Rep. 965. Trin. 2. Ann. in Case of Squire v. Grevett.

Fol. 268.

(A. a) What Persons shall be bound by their Submission.

[1. IF an infant submits a battery done to himself, and an award is made thereupon, yet this shall not bind the infant. 13 H. 4. 12. Dubitatur.]

Br. Arbitrement, pl. 43. cites S. C. that if infant submits to arbitrement, and an award is made, this shall bind him, for it is for his avail to excuse him of trespass, whereof he is impeachable by law; per Strange, but the book says, Quære. — Br. Coverture, pl. 62. cites S. C. and S. P. by Strange, and Quære. — Fitzh. Arbitrement, pl. 4. cites S. C. and by Babb. and Strange, the infant is not bound by it.

[ 110 ]  
[2. So if an infant submits a trespass done to him in his land, and an award is made thereupon, yet this shall not bind him. Contra. 10 H. 6. 14.]

Br. Arbitrement, pl. 10. cites S. C.  
[3. An award made upon the submission of the predecessor prior shall bind the successor. 2 H. 4. 4. b.]

So where an award was between the plaintiff and the intestate in writing, it was for  
4. Debt against an executor upon an arbitrement made in the life of the testator. It was demurred in law, because the testator might have waged his law; and adjudged without argument that it lay not. Cro. E. 557. Pasch. 39 Eliz. B. R. Hampton v. Bowyer.

for the same reason adjudged for the defendant. Cro. E. 600. pl. 8. Mich. 39 & 40 Eliz. B. R. Bowyer v. Garland. — See (E) pl. 23. Freeman v. Barnard.

Mar. 141. pl. 215.  
S. C. argued by the  
5. If the condition of a bond recites that an infant both submitted himself to an award, and that therefore the defendant binds himself that the infant shall perform it, this makes the bond void; because the

the submission being void, all is void; agreed per Cur. Mar. 112. pl. 189. Trin. 17 Car. in Case of Rudston v. Yates.

—Freem. Rep. 139, 140. pl. 160. Arg. cites S. C. but the Court seemed to deny it; for tho' it be void as to the infant, yet the obligation is forfeited if he does not perform it. Hill. 1673. in Case of Gill v. Russell. —S. C. cited Comb. 318. Hill. 6 W. 3. B. R. Roberts v. Newbold, but the Court held, that tho' an infant cannot submit, yet his guardian may submit for him, and bind himself that the infant shall perform the award, as was done in this case; and Eyre J. said, that there are several cases that the submission of an infant is not void but voidable, contrary to Mar. 141.

Court, and adjudged accordingly.

6. A man may submit for the debt of another, but then it must be mentioned; for the Court is to judge upon the record before them, and not upon affidavits that more was submitted than is expressed. 2 Show. 61. pl. 47. Trin. 31 Car. 2. B. R. in Case of Adams v. Staley.

2 Lev. 235. Odams v. Statham, S. C.

## (B. a) Who shall take Advantage of an Award.

[1. IF *A. hath the custody of my cattle, and during the custody they do a trespass to B. and A. and B. submit this trespass to arbitrement, and an award is made, and A. performs it, if B. brings trespass against me for this trespass, I may plead in bar the award between the plaintiff and the stranger.* 7 H. 4. 31. b.]

Br. Trespafs, pl. 85, cites S. C. —Br. Arbitrement, pl. 13. cites S. C. —Ibid.

pl. 48. cites S. C. and S. P. accordingly; for there is satisfaction by the stranger and privity; quod non negatur; but Brooke says, Tamen vide librum inde. —Fitzh. Barre, pl. 176. cites S. C. the plaintiff pleaded No award, and the other e contra; quod nota.

## (B. a. 2) Set aside for Misbehaviour.

1. BEFORE the making the award the arbitrators insisted upon three guineas a-piece to be paid them by each of the parties for their trouble and expences, which the defendant refused to do, and thereupon the plaintiff paid the whole money. The Court thought it dangerous to suffer one side only to give money to arbitrators, and set aside the award. 2 Barnard. Rep. in B. R. 463. Trin. 7 Geo. 2. Shepherd v. Brand.

## (B. a. 3) Actions. What Actions lie on an Award. [ 111 ] And what shall be said Parcel of the Award.

1. IF a man be bound to stand to the arbitrement of J. N. who awards that he shall pay 10l. there the obligee shall not have debt upon the obligation and upon the arbitrement also, per Littleton, quære; for some said, where trespass is put in arbitrement &c. who awards as above, and the defendant will not obey the arbitrement, the other shall have trespass, and shall recover his damages, and shall have debt upon the arbitrement also; quære. Br. Dette, pl. 23. cites 33 H. 6. 2.

2. Debt upon bond for performance of an award; the arbitrators awarded, that defendant should enjoy such a house, of which the

Ibid. cites S. P. adjudged accordingly.

Mich. 18  
& 19 Eliz.  
in Case of  
Tresham v.  
Robins.—  
5 Le. 58. pl.  
86. Mich.  
17 Eliz.  
B. R. S. C.

*the plaintiff was lessee for years, during the term, paying to the plaintiff yearly 20 s. and for non-payment thereof debt was brought.* The Court held clearly that this was part of the award, and that debt lay on the bond, and so was the intent of the arbitrators; and judgment for the plaintiff. Cro. E. 211. pl. 1. Hill. 33 Eliz. B. R. Parsons v. Parsons.

& S. P. by Wray, and that this rent should not cease by eviction of the land.——A. and B. are bound to each other to stand to an award; the arbitrators award that A. shall make a lease for years to B. rendering rent to A.—A. makes the lease. B. does not pay the rent. The justices held that the obligation is not forfeited, because distress or debt are the proper remedies. But if the award had been that the lessee should pay the rent, the obligation had been forfeited. Mo. 3. pl. 8. Mich. 28 H. 8. Anon.——Bendl. 15. pl. 16. Mich. 27 H. 8. S. C. & S. P. accordingly; for the words (rendering certain rent) are not parcel of the substance of the said award, but the making the lease is the effect thereof.

Freem. Rep.  
410. pl. 541.  
Trin. 1675.  
S. P. accord-  
ingly, per  
Cur. Anon.  
—Freem.  
Rep. 415.  
pl. 550.  
Mich. 1675.

3. If a man is bound to perform an award of arbitrators, and accordingly they make an award to pay money, in such case the person to whom it is to be paid may have an action of debt for the money, and declare upon the award, and afterwards he may have another action upon the bond for not performing the award; per tot. Cur. Brownl. 55. Mich. 5 Car. Anon.

S. P. by Twissden, in Case of Jenkinson v. Allifson.

### (C. a) Declaration upon an Award

Br. Dette,  
pl. 151. cites  
S. C.

1. **I**N debt upon arbitrement the plaintiff ought to count for what cause they put themselves in arbitrement. Br. Arbitrement, pl. 34. cites 5 E. 4. 1.

In debt on  
award it is  
sufficient to  
shew so  
much of the  
award as is  
the ground  
of the ac-  
tion, and it  
is good  
pleading of  
the award  
with an

2. In debt &c. upon an award, the plaintiff set forth an award, that the defendant should pay to the plaintiff 10l. in full satisfaction &c. It was objected, that this declaration was not good, because it did not appear that any thing was awarded to the defendant; but the Court was clear of opinion, that the plaintiff is not bound to set forth the whole award in his declaration, but only so much of it as does entitle him to the thing &c. and if the defendant will impeach the award, it must come of his side. Le. 72. pl. 97. Mich. 29 & 30 Eliz. C. B. Smith v. Kirfoot.

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*inter alia*; and judgment accordingly. Litt. Rep. 312, 313. Mich. 5 Car. C. B. Leake v. Butler.——Mod. 36. pl. 87. Hill. 21 & 22 Car. 2. B. R. Rich v. Morris, the declaration being *inter alia* was held naught, by Twissden J.——It was insisted, that in debt on an award the plaintiff need not set forth more of the award than makes for him; and this was agreed to be so, but it was said to be otherwise in debt upon a bond [of submission] for there the plaintiff must reply to the whole award. 1 Salk. 72. pl. 9.

If a void part of the award be omitted, so that it be such part as does not avoid the whole award, it may be well enough; for where an award contains several matters to be done on the plaintiff's side, all which are well awarded and to be performed by the plaintiff, and he sets out enough only to entitle him to an action, and they come and plead no award, and upon oyer it appears that the plaintiff was to do more than he set forth, and that those things were well awarded, viz. that the award was well as to them. It was said, that in debt on an award he need only set out so much as would entitle him to an action, but that he ought to shew so much of it as was necessary to make it good; and Holt seemed to approve the case in Le. 72. that debt lies on an award without setting it all out; per Holt Ch. J. 12 Mod. 534. Trin. 13 W. 2. in Case of Furlong v. Thornigold.——Ld. Raym. Rep. 715. Foreland v. Thornigold, says, that if the plaintiff had shewn all the part of the award that was good, and had omitted to shew part of it that was ill in itself and void, upon issue of nul agard fait that would not have



have been a material variance; and Holt Ch. J. said it had been ruled before upon evidence at a trial at nisi prius at Guildhall; and Gould J. ruled it accordingly at the summer assizes in the home circuit.

3. *Trespass*; the defendant pleads an arbitrement in bar, that the defendant should pay to the plaintiff 20s. upon which the plaintiff demurs, because he does not allege a place where the submission was, and cited 9 H. 6. 5. nor does he allege performance of the arbitrement, and does not answer to the vi & armis; and for these causes it was adjudged for the plaintiff. Cro. E. 66. pl. 13. Mich. 29 & 30 Eliz. B. R. Hare v. Gorge.

The declaration needs not to express any time or place certain where the award or submission was made;

but if the defendant pleads that the arbitrators made no award, or that the parties did not submit themselves to their award, the plaintiff may reply that the arbitrement or submission was made at such a place; agreed by all the justices. 2 Brownl. 137. Mich. 9 Jac. C. B. in Case of Holcroft v. French.

4. In debt upon the bond of submission there was a demurrer, because (as was insisted) the action here is merely grounded on the award, and therefore there ought to have been a *profer* of it in Curia; but Roll Ch. J. said it is not necessary; and Glyn Ch. J. was afterwards of the same opinion, though the award must be pleaded in writing, and the action is not brought on the award but on the submission; for the award is only the inducement, and the Court has nothing to do with it but to see whether it be in writing or not; and afterwards he said, that an award under seal is no deed, and therefore need not be produced; and judgment accordingly. Sty. 459. Trin. 1655. Dod v. Herbert.

If money be awarded, and the plaintiff brings debt for the money generally, without shewing the award of both parts, this is good, and the plaintiff shall have

his judgment; agreed by Twissden J. who said it had been so adjudged. Sid. 161. in pl. 14.

5. An award that defendant should pay to the plaintiff 50l. and that the plaintiff should deliver such writings and sign a release; the plaintiff set forth the award, but did not allege that it was in writing. The plaintiff had a verdict, but judgment was stayed and given for the defendant, because the award was void; for the defendant has no remedy for the writings and release upon this parol submission, for it does not imply a promise to perform it, and so it is an award of one part only. Lev. 113. Mich. 15 Car. 2. B. R. Tilford v. French.

Sid. 160. pl. 14. S. C. and the Court inclined accordingly.

6. An award was, that defendant pay the plaintiff so much money at such a time and place. In debt upon the bond the plaintiff did not aver that he was ready at the place to receive the money; and exception being taken thereto, Holt Ch. J. held that it needed not, because the defendant ought to do the first act, and therefore if he does not come and tender the money, tho' the plaintiff be not there to receive it, the bond will be forfeited. Ld. Raym. Rep. 533, 534. Hill. 11 W. 3. Doyley v. Burton.

## (D. a) Plea, Replication, &amp;c. The Manner of setting forth an Award in Pleading.

1. **I**N audita querela, Finch said for law, that arbitrement is no plea in trespass, if the defendant does not say that the arbitrators awarded that he should give something to the plaintiff, more or less. Quod non negatur. Br. Arbitrement, pl. 6. cites 43 E. 3. 28.

2. In debt upon arbitrement the defendant cannot plead *nulli submission*; for he may wage his law, and there he cannot traverse the cause of the debt nor the contract. Br. Traverse per &c. pl. 64. cites 8 H. 6. 5.

3. In debt upon an obligation the defendant pleaded indorsement to stand to the award of two, ita quod fiat citra Mich. and that they made the award after the day, absque hoc that they made the award before the day. Cotton J. said, you plead ill; for it suffices to say Quod non fecerunt arbitrium ante diem, and give the matter in evidence, and so he did; quod nota. The plaintiff said that they made award before the day, and that the parties put their seals to the award; and the plaintiff put his seal, and required the defendant to put his seal, and he refused, and so the action accrued &c. And so see that upon award the plaintiff ought to declare how he has performed his part, and in what the defendant has broke his part; quod nota; and so it was agreed [in time of] H. 8. Chantor said the submission was only of all trespasses, and therefore this is not of the submission; but per Newton, this is a thing which depends upon the submission. Br. Arbitrement, pl. 18. cites 8 H. 6. 18.

4. In trespass it is a good plea that they put themselves in arbitrement, and the arbitrators awarded that the defendant shall pay to the plaintiff 10 l. at such a day, which is to come; for debt lies of it when the day is come. Br. Arbitrement, pl. 46. cites 20 H. 6. 12.

5. Detinue by W. against J. of 2 obligations, who said that they were delivered to him by W. and T. upon certain condition, and prayed garnishment, and had it, and T. came, and said that the said T. and W. the plaintiff put themselves in arbitrement of the said J. and B. &c. and that the obligations were delivered to the said J. upon condition to stand to the award of the said J. and B. and that if each of his part perform the award, that each shall re-have his own obligation; and that if the one breaks the award, and the other performs it, that he who performs it shall have both obligations; and that they awarded that the said W. should receive the profits of the manor of C from Mich. 20 H. 6. till the feast of the Annunciation then next ensuing, and should pay to the said T. at the said feast of the Annunciation 10 marks, and that the said W. sever the manor by itself, and the land in D. by itself, into two parts, and that the said T. should choose which part he would have, and hold it without impeachment of the said W. and that if the said W. pay to the said T. the said 10 marks at the day aforesaid, then he should suffer the said

Br. Traverse  
per &c. pl.  
88. cites  
S. C. —  
S. P. Br.  
Garnish,  
pl. 31. cites  
21 H. 6. 52.

*said W. to occupy the said moiety peaceably, and said that the said W. did not pay to him the said 10 marks, so his obligation belonged to him; and as to his own obligation, said that the said W. did not make partition of the said manor; and in case he had made the partition he was ready to have chose his part, and to suffer him to retain his part, and so his own obligation belonged to him also; and the Court held the plea \* double, viz. the not making of the partition, and the non-payment of the 10 marks. Br. Arbitrement, pl. 22. cites 21 H. 6. 18. But Brooke says Quære inde.*

\* S. P. Br. Double Ple, pl. 48. cites S. C.

6. Whereupon he took the non-payment by protestation, & pro placito quod non fecit partitionem. Markham said the obligations were delivered upon condition as above, and that the arbitrators awarded that the plaintiff should pay the 10 marks to the said T. and make the partition as above; and further awarded that, after the partition made, each of them should release all his right to the other, and that T. should make the said moiety, absque hoc that they made such award only modo & forma, prout &c. And per Paston, if all is as you have said, yet no default is in T. For if T. has performed his part, he ought to have his own obligation; and if W. has not performed the award, T. has cause to have both; by which Markham said that he made the partition, and paid the 10 marks, and that he was at all times ready to have released to the said T. and T. had not released to him, and so the obligation belonged to him; absque hoc that they awarded only modo & forma, prout the said T. has alleged; and after per Paston, the (only) cannot make issue. Br. Arbitrement, pl. 22. cites 21 H. 6. 18. But Brooke says Quære inde.

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Debt upon bond for performance of an award. The defendant pleaded that the submission was of all actions depending between them, and the arbitrators awarded that all suits should cease, which he averred he had done. The plaintiff replied that they farther awarded

that the defendant should pay the plaintiff 15l. on such a day, which he had not paid, and traversed that they awarded only as the defendant had alleged. The defendant rejoined that the award was to pay 15l. at the house of J. D. a stranger, and then the plaintiff to release all actions to the day of the release, which he had not done. Upon this plea the plaintiff demurred. It was objected that the replication was ill; for that the plaintiff had traversed that the arbitrators made such an award only as the defendant had set forth in his plea, when in truth he did not allege any such thing; and a thing which is not expressly alleged cannot be traversed. But per Coke Ch. J. the plea here is good without a traverse, and also with a traverse as it is here; and per Cur. the traverse is good. And Doderidge J. said that when the defendant pleaded that the award was that he should cease all suits, this shall be intended to be the whole award; and the other having pleaded that they awarded more, he may well traverse as before. And Coke and Doderidge said, that when an issue as above, without traversing that the award was only as the defendant had alleged, no other matter can be pleaded as here of a further award. Judgment for the plaintiff in B. R. and affirmed in the Exchequer Chamber. Roll Rep. 5. pl. 7. Pasch. 12 Jac. Linsey v. Ashton.—2 Bulst. 38. S. C. the whole Court agreed clearly that the defendant's pleading is altogether vicious; that the plaintiff's replication is good, and so judgment for the plaintiff.—Godb. 255. pl. 352. S. C. adjudged for the plaintiff.

7. Thereupon Markham said by protestation, that they awarded that he should pay the 10 marks, and that the said T. should have the release, which is not delivered; but for plea says they awarded that the partition should be made of the same manor, and of other land in D. together, which he did, and the said T. refused this partition, absque hoc that they awarded the partition to be made severally of the manor by itself, and of the land by itself, prout &c. and Paston maintained the partition to be made generally, and so ad patriam; and it was said

Br. Traverse per &c. pl. 88. cites S. C.

- \* See pl. 6. said there that anno 19 the party was not permitted to take *issue upon the (\* only)*. Brooke says *Quod miror*. Br. Arbitrement, pl. 22. cites 21 H. 6. 18.

S. C. cited per Cur. 8 Rep. 82. b. to have been held a good bar, without averring any notice to have been given; and says that so it is adjudged in 28 H. 6. 6. b. 6 H. 7. 10. &c.

He must shew where the submission was made; and

so likewise where the award was made. Br. Pleadings, pl. 70. cites 3 H. 7. 11.

In *trespass* the defendant pleaded an award in bar, that he should pay the plaintiff 20s. but because he did not allege a place where the submission was, according to 9 H. 6. 5. nor allege performance, nor answer to the *Vi & Armis*, it was adjudged for the plaintiff upon demurrer. Cro. E. 66. pl. 13. Mich. 29 & 30 Eliz. B. R. Hare v. Gorge.

- [ 115 ] 10. In debt the condition was to stand to the arbitrement of J. K. between the defendant and the tenants of W. C. The defendant said that he did not make any award by the day. The plaintiff said that he made award between the defendant and P. and Q. tenants &c. The defendant said that they were not tenants at the time &c. and a good plea, without saying nor ever after; for they should be tenants at the time of the arbitrement. Br. Conditions, pl. 219. cites 39 H. 6. 6.

11. Debt upon an obligation by J. C. against A. S. Wangford said *Actio non*, for after the obligation the parties made indenture of *defeasance* upon it, *quod si uterque eorum steterit ordini R. B. and J. W. of all actions, quarrels, debts &c. and of the right, title, and possession of the 3d part of the manor of L. ita quod the award be made and delivered before Michaelmas next &c. and that if they do not make award by the day, then they shall stand to the arbitrement of W. G. so that this award be made before Christmas*, that then the obligation of him who performs the condition shall be void, and the obligation of him who breaks it shall be in force, and that the arbitrators took upon them the charge of the arbitrement, and such a day, year, and place awarded that A. S. should pay to the said J. C. 10l. and that A. S. should cease from all suits which she had against the said J. C. and that she should make certain persons to cease a *decies tantum* which they had brought against certain jurors who passed between the plaintiff and defendant in *assise*, and that they perform the award which the same arbitrators at another time made between them of the 3d part of the said manor, and after these things performed that each should release to the other all actions; and the defendant said that she, viz. A. S. for her part had performed the award, and paid the 10l. and ceased the suits; and as to the 3d part of the manor &c. said that the arbitrators did not make any award of it, & hoc &c. and Lacon demurred, and the other the like, and exception was taken to the plea, because it is *quod uterque*

*utrumque eorum stare* to the arbitrement, which is, that as well the plaintiff as the defendant should perform every part, and yet well per Cur. For this shall be intended, quod uterque pro parte sua stabit & performabit &c. and not that each should perform both parts; and this is also explained in the end of the defeasance, which is that the obligation of him who performs shall be void, and the obligation of him who breaks his part shall be in force, and therefore this is each for his own part, per Cur. And another exception was, because the defendant said that they made no award of the 3d part of the manor &c. and did not say if the umpire made any award of it, and yet a good plea per Cur. For if the arbitrators meddle with any part, the umpire cannot meddle by the words as above, which are that the arbitrators shall make it citra festum Mich. and if they do not make it, that then the umpire shall make it. Br. Arbitrement, pl. 29. cites 39 H. 6. 9.

12. And another exception was taken, because the defendant said that she has ceased in the suits, and did not say in what suits, nor in what court, nor how, by nonsuit or otherwise, or if she did it at her own costs, and yet good per Cur. For ceasing does not lie in record, but continuance lies in record, which shall come of the other part to shew if any such thing be. Br. Arbitrement, pl. 29. cites 39 H. 6. 9.

13. Where an arbitrement is pleaded in bar, it is sufficient to say that they put themselves in award generally. Br. Arbitrement, pl. 34. cites 5 E. 4. 1.

14. Debt upon an obligation to stand to the arbitrement &c. The defendant said that the arbitrators did not make any award, and the plaintiff prist that they did, and so to issue, and this is jeofail; for the plaintiff shall shew certainly what award and \* where, and that the defendant in such point did not perform it; and the defendant shall say that they made no such award, and the plaintiff shall say then prist that they did, and the defendant shall say prist that they did not. Br. Pleadings, pl. 88. cites 5 E. 4. 108.

Br. Issues  
Joined, pl.  
32 cites S. C.  
Br. Repleader,  
pl. 35.  
cites S. C.  
and S. P. by

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which they  
were award-

ed to replead, and after the defendant would have pleaded in bar de novo, and was not suffered, unless it were a thing that happened since; for the bar was good before, and the replication ill, and they upon repleader shall commence at the default, and not before; quod nota.

\* Debt upon bond for performance of an award. The defendant pleaded, nullum arbitrium. The plaintiff replied, and set forth the award made, but did not shew where it was made, and which is issuable. It was adjudged against the plaintiff upon a general demurrer, because it is matter of substance. Cro. E. 758. pl. 27. Pasch. 42 Eliz. C. B. Bretton v. Pratt.

In debt upon bond for performance of an award, the defendant pleaded, no award made. The plaintiff replied, and confessed no award made, but says that on the 18th of August &c. the umpire made and delivered to the defendant at his house &c. an umpirage &c. and so sets it forth, and assigns breach. Upon demurrer it was objected that the plaintiff did not shew where the umpirage was made, which is traversable; but per Cur. this cannot be objected after no award or umpirage pleaded, because if he shews any thing to make the award void, it would be a departure; and judgment for the defendant, nisi &c. 3 Lev. 238. Mich. 1 Jac. 2. C. B. Barnes v. Harvey.

In debt on arbitration-bond the defendant pleaded, no award. The plaintiff replied that after the bond made, and before the time limited for making the award, viz. 30 die Novembris anno &c. per quoddam scriptum suum arbitrii adtunc & ibidem factum &c. and then sets forth the award. The defendant demurred, because no place was mentioned where the award was made. The Court held that the adtunc & ibidem cannot be referred to the place in the declaration, and there is no place mentioned in the replication; and so judgment for the defendant. 2 Vesp. 72. Mich. 1 W. & M. ja C. B. Leigh v. Ward,

[ 118 ] S. P. by Holt Ch. J. accordingly ; but adjournatur. — Show. 241. S. C. says, it was in writing, and therefore ready to be delivered, and adjudged for the plaintiff. — Carth. 158. Reuby v. Manning, S. C. adjudged for the plaintiff.

23. *Debt upon bond*, the defendant demanded oyer of the condition, which was *for the performance of the award of A. P. so as it be made on or before 27th June &c. and if not, then to stand to the umpirage of &c.* the defendant pleaded, *no award made before 27th June*; the plaintiff replied, and shewed that the umpire made an umpirage, and assigned a breach, which was ill; and defendant demurred. Keeling Ch. J. held that judgment should be for the defendant, though his bar is ill; for the condition upon the oyer is part of the declaration, and so it appears by the replication, that there is no cause of action. But all the other justices e contra, and that a bar so ill in substance cannot be cured by the replication, tho' it seems to admit, that no award was made on the 27th of June, because it sets forth an umpirage made after that day; but such implication cannot cure the bar, for if an award was made on that day, then the umpirage is void in itself. Adjournatur to be mediated by friends, it being between two brothers. Sid. 336. pl. 2. Trin. 19 Car. 2. B. R. Bamfield v. Bamfield.

Lev. 245. S. C. adjudged for the plaintiff. — Saund. 169. S. C. adjudged per Cur. for the plaintiff. — Heath's Max. 51. cites S. C. says it is good, without saying *infra tempus limitatum*; for they may traverse nullum arbitrium &c. without traversing the day, and if it be not before the day, the jury is bound to find it.

24. *In debt on bond for performing an award, and no award pleaded*; the plaintiff replied, *that ante exhibitionem bille, viz. 24th June, the arbitrators made award*; the defendant demurred generally; it was agreed by all, that if the demurrer had been special, judgment should have been for the defendant, because the plaintiff ought to have replied, *that the arbitrators made their award before the day limited for it*; but because the demurrer was general the plaintiff had judgment. Nota, the 24th July was within the submission. Sid. 370. pl. 10. Trin. 20 Car. 2. B. R. Skinner v. Andrews.

25. *An award was that the defendant should pay 3100l. to the plaintiff, and that they should give each other general releases; in debt upon the submission bond, the defendant in his plea confessed, that the award was, that he should pay so much, and execute a general release, and then averred performance*; the plaintiff replied, and tendered an issue upon non-payment; the defendant waved the issue, and pleaded an insufficient rejoinder; and because neither the plaintiff nor defendant had set forth that the plaintiff was to execute a release to him, and so the award as pleaded was of one side only. It was held that the plaintiff could not have judgment, but the Court looked upon it to be a trick in pleading; they would not give judgment for the defendant, but gave the plaintiff liberty to discontinue upon payment of costs; but afterwards it appearing on an English bill in the Exchequer, that there was male practice of the plaintiff with the arbitrators, and it being likewise a case of great extremity upon the defendant, the money awarded being 1100l. more than the very penalty of the bond, ubi revera there was nothing

thing due to the plaintiff, but he was indebted to the defendant, the defendant was relieved against the bond. Saund. 326. Mich. 21 Car. 2. Veale v. Warner.

26. *Debt upon bond for the performance of an award &c. The defendant pleaded, no award made &c. the plaintiff replied, and shewed an award made, and ready to be delivered to the parties; the defendant rejoined, that the award was not tendered to him on the day, & hoc paratus est verificare, and upon a demurrer, this rejoinder was held ill, because it was a departure from the plea, for that was, no award made; but the rejoinder was, that the award was not tendered, which implies it was made; besides, this rejoinder was ill concluded, for the replication sets forth, that the award was ready to be delivered to the parties, the rejoinder says it was not, which is a negative and affirmative, and that is a plain issue; therefore he should have concluded to the country, and not have averred the rejoinder. Arg. 2. Saund. 188, 189. Mich. 22 Car. 2. Roberts v. Mariett.*

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27. *Debt upon bond for performance of an award, so as it be ready to be delivered to the parties at such a day and place; the defendant pleaded, no award made; the plaintiff replied, and set forth an award delivered to the parties before the day, and at another place than mentioned in the submission, and upon demurrer, Hale Ch. J. held the replication ill, because it being only the execution of an authority, it ought to be made at the same day and place; but the others e contra, and adjudged for the plaintiff, because the award was delivered to the parties themselves. 2 Lev. 68. Mich. 24 Car. 2. B. R. Elborough v. Gates.*

28. *Bond was for performing an award de præmissis vel aliqua parte inde; the defendant pleaded, no award made de præmissis. On demurrer it was objected that it was not said, nec de aliqua parte inde, for if a bond be to perform an award of 2 or either of them, it is not sufficient to plead that those made no award, without adding, nec aliquis eorum; but if an award is to be made of the manors of D. and S. or either of them, and the award is made of D. only, it is well enough. But as to the first part, it was answered that nullum fecerunt arbitrium de præmissis is well enough; for that implies nec de aliqua parte inde, especially if the contrary is not shewn in the replication, and therefore it shall never be intended that an award was made of some part; Curia advisare vult. 2 Mod. 27, 28. Pasch. 27 Car. 2. C. B. Bridges v. Bedingfield.*

29. *Debt upon bond, the defendant craved oyer of the bond and condition, which was to perform an award, so as it be in writing under the hand and seal of the arbitrator, and upon nullum arbitrium pleaded the plaintiff replied, and set forth an award under the seal of the arbitrator; the defendant rejoins, no award under hand and seal, according to the condition of the bond, and upon a demurrer to the rejoinder, the defendant had judgment; for per Cur. the plaintiff ought to have replied, an award under the hand as well as the seal of the arbitrator, for he must plead*

*Submission was with ita quod the award be made in writing, to be delivered to the parties &c. the defendant pleaded that the arbitrator made it*

*an award under the hands and seals, and ready to be delivered* it formally as well as produce it. 2 Mod. 77. Pasch. 28 Car. 2. C. B. Columbel v. Columbell.

Exception was taken, because it was not expressly averred that the award was made in writing as required by the submission; sed non allocatur, because it must necessarily be intended that it was in writing, it being pleaded that it was under the hands and seals of the arbitrators; but Hale then Ch. J. of C. B. doubted. Cited by Dolben J. Carth. 159. as a Case in C. B. when he was at the bar, Fuller v. Lane. — S. P. and the Court held the replication naught for want of an averment. Freem. Rep. 415. pl. 55c. Mich. 1675. Jenkinson v. Allison.

Submission was of all controversies between the parties, and the arbitrators *to make and publish their award in writing under their hands and seals &c.* Upon nullum arbitrium pleaded the plaintiff replied, and *set forth an award, per scriptum suum indentatum sealed with the seals of the arbitrators, to pay the plaintiff 66l. and avers, that the award was ready to be delivered to the parties under the hands and seals of the arbitrators, and assigns the breach in non-payment; it was objected, that it is not averred that the award was made and published under the hands and seals of the arbitrators, but only by writing indented sealed with their seals; but it was answered, that it is afterwards said that it was ready to be delivered &c. under their hands and seals, which is sufficient; and judgment for the plaintiff; and affirmed in error.* Lutw. 558. Mich. 11 W. 3. Lambard v. Kingsford.

30. *Debt upon bond for performance of an award; upon nullum arbitrium pleaded the plaintiff replied, that he was possessed of a mill, to which the defendant pretending title, brought an ejectment, and had judgment by default; and the dispute was, whether the defendant should have it, or the plaintiff should keep it, and thereupon they submitted to the award &c. and afterwards, but before the time for making the award, the defendant brought an habere facias possessionem upon the said judgment, and the mill was delivered to him, and sic non stetit arbitrio &c.* Upon a demurrer to this replication, it was insisted for the defendant, that tho' [ 120 ] he had the possession, yet that matter is still arbitrable; sed per Cur. a particular controversy is set forth in this pleading, and the defendant by his own act having taken away the subject matter, has also taken away the possibility to make an award of it. 2 Jo. 134. Hill. 31 & 32 Car. 2. B. R. Green v. Taylor.

31. *In debt upon bond to perform an award; the plaintiff pleads an award that the defendant should pay to the plaintiff so much &c. and that he tendered it accordingly, and that the plaintiff refused; the plaintiff replied that the umpire awarded the money to be paid in satisfaction of all controversies, and that the defendant did not tender it, and concludes to the country; and upon a demurrer it was insisted, that the plaintiff having alleged new matter in his replication, he ought not to have concluded to the country, for by that means he had deprived the defendant of his traverse to the new matter, and therefore cannot have judgment, especially since it does not appear by the pleading whether the award was good or not; and of this opinion were Jones Ch. J. and Charleton, but Windham and Levins e contra, because the defendant having admitted the award to be good, and taken upon him to plead performance, he shall not afterwards be admitted to traverse it, to prove it no award. But if the award was not in satisfaction of all controversies, and so an award of one part only, the defendant should have pleaded at first no award, but to admit him now to a traverse to prove it no award,*



award, would be a departure. Court divided. 3 Lev. 164. Pasch. 36 Car. 2. C. B. Seal v. Crow.

32. In debt on bond to perform an award in writing or by word of mouth. The defendant pleaded, no award. The plaintiff replied, that at the time of the bond and award he had an action for scandalous words against the defendant, and that the arbitrators did declare and publish their award thus, viz. that the defendant should pay the plaintiff 12 guineas, and all such monies as he had expended in and about the prosecution of the plea aforesaid, and that the parties should give mutual releases to the date of the said bond &c. It was objected, that the award is void, because it does not mention any suit before to refer the (plea aforesaid) unto. But per Cur. if the award had been in writing, with such form of expression, it could not be good, but in setting out an award by parol it is sufficient to shew the effect and substance of what was awarded by word of mouth, and it is sufficiently shewn that this award was made concerning the action of slander; and judgment for the plaintiff. 2 Vent. 242. Mich. 2 W. & M. in C. B. Hanson v. Leverledge.

Carth. 156. S. C. adjudged accordingly. — In a parol award the very words need not be expressed, but the effect and substance of it, and therefore where it was said, quod arbitratores de & super præmissis arbitrarunt & determinaverunt, it is tantamount to saying that the arbitrators for the conclusion of all differences between the parties accorded &c. and judgment accordingly. Comyns's Rep. 330. pl. 167. Mich. 6 Geo. 1. C. B. Thomlinson v. Arrifkin.

33. And it was also held, that the plaintiff need not shew that there was cause of action; for that is left to the arbitrators, and they have power to award charges thereupon, though in point of law there was no cause of action, because the parties have made them their judges. 2 Vent. 242, 243. Mich. 2 W. & M. in C. B. Hanson v. Leverledge.

If the suit were without any just cause, yet the award will be good. Carth. 156, 157. S. C.

—And 2 Vent. 143. the Court said they were not satisfied with the opinion reported by Siderfin in Spigurnel's Case, and said that he was then a young reporter. [The case is at Sid. 12. pl. 9. Spigurnel v. Jene.]

34. Submission was, ita quod the award be made &c. by the arbitrators, and if not, then ita quod it be made de præmissis by the umpire, either in writing or by word of mouth, before two witnesses, at or before &c. The defendant pleaded, nullum arbitrium; the plaintiff replied, and shewed an award made by the umpire by word of mouth, but did not aver that it was made before witnesses; and therefore judgment was given for the defendant. Lutw. 536. Trin. 10 W. 3. Wilson v. Constable. [ 121 ]

35. Averments are allowed in pleading to make an award good; per Gould J. Ld. Raym. Rep. 612. Mich. 12 W. 3. in Case of Clapcott v. Davy.

The alleging the award to be made de & super præmissis supplies all averments; per Holt Ch. J. Ld. Raym. Rep. 533. Hill. 11 W. 3. in Case of Doyley v. Burton.

But an award that is void in itself cannot be made good by an averment that it was made de & super præmissis. Ld. Raym. Rep. 247. Trin. 9 W. 3. Bacon v. Dubarry.

36. In debt on bond to perform an award, the defendant pleaded, no award; the plaintiff replied, and set forth an award with

12 Mod. 533. Furlong v. Thornidge.

S. C. adjudged for the defendant.—*Id.* Raym. Rep. 715. Foreland v. Hornigold S. C. says the Court gave leave to discontinue upon payment of costs. 12 Mod. 648.

Courtney v. Hornigold, S. C. and says, that it appeared on the oyer that it contained more matter than the plaintiff shewed in his replication, and that Holt Ch. J. advised them to discontinue and pay costs, and so they did,

with a *profert in curia*, and there were several material omissions; the defendant craved oyer, and demurred for the variance between the award in the replication and the oyer; per Holt Ch. J. in debt upon a bond to perform an award, if nul agard fait be pleaded, and the plaintiff replies, an award &c. and issue is thereupon, and there is a material variance between the award given in evidence and the award set forth in the replication, it is against the plaintiff; but if the variance be only by omission of that which is void, it is no material variance being no material part of the award; but because the variances are by omissions that are material, judgment must be for the defendant. 1 Salk. 72. pl. 9. Trin. 13 W. 3. B. R. Foreland v. Marygold.

### (E. a) Pleadings. Of setting forth the Breach of the Award.

1. **I**N pleading performance where the award is that *A. shall pay to B. 20l. and then B. shall release to him totally*, and A. brings debt upon an obligation, it is sufficient for B. to shew this matter, and that *A. has not paid the 20l.* Br. Arbitrement, pl. 28. cites 36 H. 6. 15.

2. *So he shall say if he himself has released*; for he is not bound to release till the other has paid the 20l. Br. Arbitrement, pl. 28. cites 36 H. 6. 15.

3. It was said, that in debt upon arbitrement he may *traverse* the arbitrement *or wage his law*. Br. Traverse &c. pl. 245, cites 13 E. 4. 4.

4. In debt upon an obligation, the defendant pleaded, condition to stand to the arbitrement of J. and N. *so that the award be made before such a day, and said that the award was not made by the day, the plaintiff may say that they made such award before the day, which the defendant in such a point, and shew certain in what, has broken*; for he shall shew the breach in some point certain, for otherwise action does not lie; quod nota, Br. Arbitrement, pl. 42. cites 31 H. 8.

5. *Submission was of all matters, suits, quarrels, actions, and debates whatsoever, now depending between them at law, or otherwise in controversy between them. The award was to pay the plaintiff such a day 5l. in satisfaction of all accounts, suits at law, arrearages of tithes unjustly taken at any time before &c. The breach was alleged for not paying the 5l. the defendant demurred, because the plaintiff did not aver that there was any suit depending &c. at the time of the submission; for if there*  
[ 122 ] *was not, the award was void and out of the submission, but adjudged by 2 justices (only present) for the plaintiff, because it shall*

*shall be intended to be adjudged for matters in suit, and an averment needs not; for otherwise every award may be avoided by such a naked surmise.* Cro. E. 66. pl. 14. Mich. 29 & 30 Eliz. Fuller v. Spackman.

6. In debt on an arbitration bond, the defendant pleaded, that the award was, *that defendant pay the plaintiff such a day 100l. or find two sufficient sureties to be bound with him for payment at 20l. a year*, and that he had performed the said award. The plaintiff replied, that the defendant had not paid him the said 100l. and so assigned the breach of the award in the non-payment. Upon demurrer by the defendant the Court was clear of opinion that the replication was good; for tho' the award be in words disjunctive, yet in law and substance it is single; for as to the finding sureties the award is void, and so nothing is awarded but the payment of the 100l. at the day, to which the replication is a full answer; and judgment for the plaintiff. Le. 140. pl. 194. Hill. 30 Eliz. C. B. Oldfield v. Wilmer.

Ow. 153. S. C. adjudged for the plaintiff. — Sav. 120. pl. 189. Willmer v. Oldfield, S. C. adjudged for the plaintiff.

7. A submission was about an inclosure between Barton-Down and North-Down. The award was of an inclosure between the down of the defendant and the down of J. S. and it is not averred that they are all one. And then tho' the issue was upon nul tiel arbitrement, yet the breach not being well assigned there cannot be any judgment for the plaintiff. Fenner and Clench J. absentibus aliis, held this a material exception, and so judgment was stayed. Cro. E. 676. pl. 5. Trin. 41 Eliz. B. R. Withers v. Drew.

8. Debt upon bond to perform an award, the defendant pleaded *no award*; the plaintiff replied, and set forth the award, but assigned no breach. It was moved after verdict, that the replication not having assigned any breach, there was no cause of action; for the bond is not for debt, but guided by the condition, and unless the Court be satisfied that the plaintiff has good cause of action the Court cannot give judgment, and this is a defect in matter of substance, and not helped by any statute. And of this opinion was the Court, and judgment was stayed. Cro. J. 221. pl. 2. Pasch. 7 Jac. B. R. Barret v. Fletcher.

Yelv. 152, 153. S. C. and held accordingly, per tot. Cur. præter Williams J. and judgment stayed. — Brownl. 105. S. C. accordingly. Saund. 103. Arg. says,

that the plaintiff is not bound in any case to shew a breach, unless in the case of an award, and the reason why he must do so in that case is, because an award may be good in part, and void in part, and therefore must shew a breach that the Court may adjudge if he has well conceived his action or not; for perhaps he has brought his action for a breach of that part of the award which is void in itself, and so has no cause of action.

In debt upon bond for performance of an award, the defendant pleaded *non submisit*, upon which they were at issue, and there was a verdict for the plaintiff, and it was moved in arrest of judgment, that there was no breach assigned; but the Court held it good, with this difference, viz. *where upon the oyer the bar is non submisit*, there it is good; because the plaintiff has no time to shew a breach, but is forced to the issue; but *where he is at liberty to reply to any part of the award*, he ought also to shew a breach, or else it is not good tho' it be after a verdict. Sid. 290. pl. 6. Trin. 18 Car. 2. B. R. Kind v. Carter.

9. Award was, that the defendant and one of the arbitrators should enter into a bond of 8l. to the plaintiff &c. In debt brought upon the bond of submission, the plaintiff alleged for breach,

Case upon a promise to perform an award, the submission

*was of one thing, and the award was of that thing, and another not in the submission, and the breach assigned*

breach, that the defendant and the arbitrator had not entered into the bond. But by Doderidge J. though they 2 jointly had not entered into the bond, yet it may be that the defendant alone had entered into the bond, and the arbitrator need not enter into it, because as to him the arbitrement was void; and to this the whole Court agreed, and cited L. 5 E. 4. 108. Godb. 164, 165. pl. 230. Pasch. 8 Jac. C. B. Pits v. Wardall.

*was, that the defendant had not performed that which was submitted and arbitrated, nec arbitrium præditi performavit in aliquo, and so to issue, and found for the plaintiff; it was moved in arrest, that the award was void as to things not submitted, and the breach was assigned in that as well as in the other, and the jury had given entire damages; sed per Curiam, the words nec arbitrium performavit in aliquo, refer only to that which was within the submission, and for the rest the award was void, and by consequence no award, and therefore damages could not be given for that.* 2 Roll. Rep. 46. Trin. 16 Jac. B. R. Tomkins v. Webb.

Bulst. 178. Eynan v. Bridges, S. C. says the whole Court inclined to be of the same opinion with Williams J. and that the plaintiff had good cause of action; but the cause was

10. The defendant was awarded to pay the plaintiff 20l. at Mich. The plaintiff before Michaelmas released to the defendant all actions and demands. The whole Court conceived that this is no bar to the plaintiff's action; and Williams J. took a difference where an obligation is entered into for payment of money at a day to come; it is there a debt and duty presently, and may be discharged by such release before the day of payment; but that it is not so in case of an annuity, rent, or in an action of debt for non-performance of an award for payment of money at a day to come. But no judgment was given. Cro. J. 300. pl. 4. Pasch. 10 Jac. B. R. Tynan v. Bridges.

ended between the parties, they perceiving which way the Court inclined, and so no judgment was given.——Yelv. 214. Bridges v. Eynon, S. C. says that the whole Court held this release as a bar to the action, and Yelverton was of counsel with the plaintiff.——Brownl. 115. S. C. but is only a translation of Yelverton.

11. On a submission of a battery the award was that the defendant release the action, and the plaintiff to pay him 10s. in satisfaction for the battery. The plaintiff set forth that he tendered a release, and the defendant refused to seal it. Defendant rejoined, that he refused to seal because he was not paid the 10s. in satisfaction of the battery. The Court held clearly that this is a good breach, and not to be helped; for by tendering the release according to the award the payment of the 10s. was not thereby discharged, and therefore the sealing it by defendant ought to precede, because this release goes only to discharge the action as to the battery, and the refusal to seal it is a clear breach; and judgment for the plaintiff. 2 Bulst. 117. Trin. 11 Jac. Bilfoord v. Flint.

3 Bulst. 69. 70. S. C. & S. P. adjudged accordingly in the Exchequer Chamber, where a former

12. The award was to pay money on or before the 16 June &c. The breach assigned was, that he did not pay it on the 16 June; but all did agree that this was well assigned; for when it is alleged that it was not paid on the 16th of June, it was not paid before the day. Bridgm. 90. 91. Mich. 12 Jac. Perryn v. Barry.

judgment was affirmed.——S. P. adjudged accordingly, 3 Lev. 293. Hill. 2 W. & M. in C. B. Watnough v. Holgate.——2 Vent. 221. S. C. the Court inclined that the award was good. Sed adjournatur.

13. If there are *divers breaches* of an award, you may assign *but one breach* of them in action brought for breach of the award. Sic dictum fuit. Sti. 429. Hill. 1654. in Case of Fowkes v. Copsey.

14. An award to make a lease before the 21 Oct. which was two or three months after, and that upon making thereof the lessee shall pay 50l. The question was, whether the lessor ought to give notice to the lessee when he would make the lease; for otherwise he must always carry 50l. about him. Resolved per Cur. that notice was not necessary. Vent. 93. Trin. 22 Car. 2. B. R. Collet v. Padwell.

15. Upon an ill plea pleaded in award, no breach need be assigned. 3 Lev. 17. Pasch. 33 Car. 2. C. B. Bowyer v. Blorkside.

3 Lev. 24-  
Mich. 33  
Car. 2.  
C. B. v.  
Genne v.

Tinker, S. P. adjudged accordingly.

16. An award was that the defendant should pay 29l. upon delivery of the award to him. The plaintiff averred that the award was delivered to him, and that the money was not paid. It was objected that the law, by a reasonable construction of the award, would allow a reasonable time to pay the money, because it was to be upon the delivery of the award, and that might be when the defendant was on a journey, or far from home; besides the plaintiff should have alleged that it was not paid upon the delivery of the award, *nec unquam postea*. But the opinion of the greater part of the Court was that the breach was well assigned, and that it shall not be intended that the money was paid after; and if it had been paid after within a reasonable time, the defendant ought to have pleaded it; and judgment for the plaintiff. Lutw. 389. 393. Hill. 2 & 3 Jac. 2. Strong v. Saunders. [ 124 ]

17. Where the matters awarded are distinct, and not the one depending on the other, there the award may be good as to one part, and void against the other; and in that case the breach must be assigned in that part that is good; per Cur. 12 Mod. 585. Mich. 13 W. 3. C. B. Lee v. Elkins.

18. An award was that all suits should cease between A. and B. Resolved that the prosecution of a suit by A. against B. and C. is no breach. 10 Mod. 205. Hill. 12 Ann. B. R. Barnardiston v. Foulyer.

## (F. a) Pleading. Of the Performance thereof.

1. IN trespasss the defendant alleged, *arbitrement that he should give to the plaintiff a piece of cloth*, the which he was at all times ready to give, and yet is, and brought it into Court; judgment *fi actio*; and a good plea. The plaintiff said that he required it, and the defendant refused to give; and the issue taken that

Br. Trespas, pl. 84. cites 7 H. 4. 30. S. P. & S. C. — In trespasss, per Marten, ar.

bitrement is that he did not refuse. Br. Arbitrement, pl. 12. cites 7 H. no plea, if he does not 4. 31.

say that he

has paid the sum awarded, or has been at all times ready to pay, and yet is, and offer the money in Court; and this where the day of payment is past, as it seems. Br. Arbitrement, pl. 19. cites 8 H. 6. 25.——S. P. Br. Double Plea, pl. 43. cites 8 H. 6. 25.

2. Arbitrement is a good plea in ravishment of ward, that the defendant should re-deliver the infant to the plaintiff, which he has done; and so it seems very often, that he who pleads arbitrement shall plead the performance of it, and it is a good plea as here without deed; contrary in assise; per Horton, quod Hank conceffit. But *quare* if this be a good plea in assise, tho' it was by deed. It seems that it is not. Br. Arbitrement, pl. 16. cites 14 H. 4. 24.

In debt on a bond for performance of an arbitrement, the defendant cannot say that he has

performed it; but ought to shew the award, and how he has performed it. Mo. 3. pl. 9. Pasch. 28 H. 8. Anon.

3. He who pleads arbitrement ought to plead that he has performed his part, and shew what or how, or to say that he is at all times ready to perform it; for otherwise it is no plea. Quod nota. Br. Arbitrement, pl. 45, cites Fitzh. Arbitrement, 10. P. 22 H. 6. 52. and 19, 45 E. 3. 16.

4. So in debt upon an obligation with condition to perform an award, which was to enfeoff, or release, or pay 20l. The defendant pleads performance generally, not shewing which of them he hath performed, and ill; for tho' performance of any one of them would have been a good excuse, yet he must shew what he hath performed. Heath's Max. 51. cites 27 H. 6. 1.

[ 125 ] 5. So A. and B. were jointly and severally bound to stand to an award to be made between them and J. S. The arbitrators awarded that A. should pay 30s. to B. and that B. should pay unto J. S. 10l. In debt on the bond it will be no good plea for A. to say that he had performed the award, without shewing in what manner it was performed, and likewise how B. had performed it; for he is bound to him also. Heath's Max. 51. cites Bendl. 5.

6. In debt upon an obligation the defendant said that the obligation was indorsed to stand to the arbitrement of W. N. who awarded that the plaintiff shall pay to the defendant 20l. at T. before Michaelmas, and that then the defendant shall make a release to the plaintiff, and that the defendant shall be nonsuit in such an action, and that the plaintiff has not paid the 20l. and a good plea; for the defendant is not bound to do any thing as here, if the plaintiff does not first pay the 20l. by which the plaintiff said that he came there at the fourth hour of the vigil of St. Michael, and there was continually till the feast of St. Michael, and neither the defendant nor any for him came there to receive the 20l. whilst the plaintiff was there ready to have paid it, and the defendant said that he was there from the 11th hour of the vigil till the feast, &c. absque hoc that the plaintiff was there ready to pay. And per Cur. the traverse shall not be suffered; for issue is tendered before, viz,

viz. in the negative, that the plaintiff was there ready, and the defendant did not come there, therefore it suffices for the defendant to say that he was there ready &c. and it is the part of him, who shall pay, to tender the money, and it is not for the other to demand it; but if it be tendered, and he refuses, there the other may allege that which may make issue. And per Danby and Moyle J. if the plaintiff be ready any time before Michaelmas to pay, it suffices, and he is not bound to be there continually. Br. Conditions, pl. 91. cites 36 H. 6. 15.

7. Award was that H. discontinue his suit against K. and bring to K. one E. his servant, by such a day, at L. and he said that he discontinued the suit, and delivered E. to N. by command of K. at S. in the county of W. whereas H. and K. were strangers to the obligation, and it was agreed that the award was void as to E. because the submission was of all actions personal, and it is not alleged that any action was pending between H. and K. for E. the servant of K. at the time, &c. and therefore it is out of the submission; contrary if the submission had been of all actions and quarrels; but per Moyle it is sufficient if cause of action was then between them; Brooke says, Quære inde; for contra per Prisot plainly. Br. Arbitrement, pl. 27. cities 36 H. 6. 8.

Br. Condition, pl. 90. cites S. C. and says that the plaintiff had judgment, for the plea is not good, because the defendant did not show what suit he discontinued, nor how, nor in what

Court, nor if it was by plaint or by writ; for he ought to have said, that he continued it to such a day, and not after. And also the delivery of E. at another place, and to another person than to K. and by the command of K. is not good; for K. and H. were strangers to the obligation, and a stranger to my obligation cannot dispense with my obligation, and between strangers it shall be performed strictly; but the party and privy may dispense with it, as where it is to pay 10l. he may take another thing in satisfaction, or take it at another place.

8. But where it was awarded that H. shall pay 20d. to him who brings E. to K. and this same H. brings E. to K. there he need not plead that he paid 20d. for he cannot pay it to himself. Ibid.

9. Two submitted themselves to stand to the arbitrement of J. S. of all trespasses &c. who awarded that the one shall pay to the other 40l. scilicet 10l. in hand, and that he shall find three several sureties to be bound every one in 10l. to pay the 30l. residue at a certain day, and by the opinion of the justices the award was void; but he shall plead the award verbatim as the arbitrators give it, and in the performance he shall say, that he himself was bound for the payment of the 30l. residue at the day &c. and shall not say if he found sureties or not; and yet he shall be excused, because he cannot compel the sureties to be bound. Br. Arbitrement, pl. 39. cities 17 E. 4. 5.

Br. Arbitrement, pl. 51. cites 18 E. 4. 22, 23. S.B. accordingly.

10. If arbitrators award, that the party shall be bound to pay [ 126 ] the 10l. by their advice, this is void; for they cannot give their award twice; contra, if they award that he shall be bound by the counsel of the other; per Brian, Nele, and Choke; note the diversity. Br. Arbitrement, pl. 51. cites 19 E. 4. 1.

11. Award was on the 1st of May, that A. should withdraw his suit in trespass against B. and that B. in satisfaction of the said trespass done to A. shall pay A. 10l. and that A. shall release the surety of the peace which he has against B. in the King's Bench;

Bench; A. by his attorney retraxit his suit; this is a breach of the award, for it ought to be done in person. Jenk. 136. pl. 80.

12. Award was made the 1st of May, and that B. should pay to A. 10s. in satisfaction of the trespass, without mentioning any time of payment; and tender was made of the said 10s. in Oshab's Michaelis next; this is a breach of the award. The arbitrement is good, tho' no time be mentioned. Payment or tender ought to be in convenient time after the award; and 5 months as in this case, between the award and tender, are not a convenient time. A tender and refusal of the 10s. in a convenient time, had saved the obligation as to this point. Jenk. 136. pl. 80.

12. If two are bound each to the other to stand to the award of J. N. who awarded that the one shall pay to the other 20l. and that the other release to him all actions; per Rede Ch. J. the one shall attend upon the other to perform this award, but each is bound to perform his part as soon as he can, in pain of forfeiture of his obligation; and so see here that there needs no request by him. But per Kingmill, all shall be performed at one time; and per Brudnell, the one is not bound to release till the other has paid; the reason seems to be, in as much as by the release the obligation, which is his remedy to obtain the sum, shall be determined as it seems. Br. Conditions, pl. 86. cites 21 H. 7. 28.

Bendl. 97.  
pl. 143.

Cox and  
Macclesfield, S. C.  
says the  
plea was  
adjudged  
naught, for  
saying quod  
non delibera-  
verunt in  
scriptis;

whereas the condition is (given up in writing), and therefore it should be (non reddiderunt in scriptis), but says this is otherwise reported in Dyer, and that he (Bendloeffs) was of council with the plaintiff.

Bond of submission was, so as it be ready to be delivered to both parties on or before such a day; the defendant pleaded, no award made; the plaintiff replied, and shewed an award ready to be delivered to the defendant, that he should pay to the plaintiff 5l. and assigned the breach in not paying it; the defendant demurred, for that the plaintiff did not shew that it was ready to be delivered to both parties, but to the defendant only; but adjudged, it shall be intended to be ready to be delivered to both, and if it was not, the defendant ought to have pleaded it at first, and his pleading it after is a departure. Lev. 133. Trin. 16 Car. 2. Br. Garret v. Weedon.

Bond of submission was, ita quod it be made, and ready to be delivered such a day; the defendant pleaded an award; the plaintiff replied, a parol award, and avers it was made, and ready to be delivered such a day. On demurrer it was insisted that a parol award was deliverable; for a man is said to deliver a message as well as a letter, and there is an oral as well as a manual tradition; and as a parol award is capable of delivery, so it is ready to be delivered from the time it is agreed upon; and judgment accordingly for the plaintiff. 1 Salk. 75. pl. 15; Trin. 3 Ann. B. R. Oates v. Bromhill. — 6 Mod. 160. S. C. and the Court at first thought the words (ready to be delivered) must mean a delivery in writing; but afterwards ibid. 176. S. C. the Court notwithstanding a Case of Wood v. Ardist in C. B. all held, that a parol award is capable of a delivery, viz. a declaration of it to the parties, or either of them if they desire it; and that it is ready to be delivered as soon as agreed upon, and the readiness need not to be averred, because the very alleging the award made imports it; and per tot. Cur. judgment for the plaintiff.

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Award was  
to pay mo-  
ney, and

14. An award was to pay the plaintiff 10l. the defendant pleaded performance; the plaintiff replied, non-payment; the defendant rejoined,



*rejoined, that he tendered it to the plaintiff, and he refused it.* Dyer *seal a release, the defendant pleaded performance; the plaintiff replied that he did not pay him*  
 thought this a departure, for in the bar the defendant pleaded, that he had performed the award, and shewed how, and now in the rejoinder is only a tender and refusal, which is not a performance of the award, altho' it be not any breach of it. 4 Le. 79. pl. 168., 29 Eliz. C. B. Clinton v. Bridges.

*&c. the defendant rejoined, that he was ready to pay him at the day and place where &c.*  
 Agreed that this is a departure; for he pleads performance, which is all one as if he had pleaded payment &c. and by his pleading ready to pay, he relinquished his first plea; and payment, and ready to pay, are different issues. Besides he does not set forth the time when he tendered it, and therefore judgment was given for the plaintiff. Sid. 10. pl. 6. Mich. 12 Car. 2. C. B. Butcher v. Whiting.

15. In debt on an obligation with condition to perform an award, which was, *to deliver up all the houses he had*; the defendant pleaded, *that he delivered up all &c. without shewing what they were*; the Court were clear of opinion, that the plea was ill. Le. 71. pl. 95. Mich. 29 & 30 Eliz. Brett v. Audar.

16. It was awarded, that defendant *should discharge and save blameless A. from such an obligation*; he pleads, *non damnificatus*; this was held ill, for he ought to shew how particularly, and it is not enough to answer to the damnification only. Le. 71. pl. 95. Mich. 29 & 30 Eliz. Brett v. Audar.

17. In debt on bond to stand to the award of J. S. *ita quod it be delivered to either of the parties before Michaelmas.* The defendant pleaded *that no part thereof was delivered to him before Michaelmas.* It was insisted that if it were delivered to any of them, it is sufficient; but all the justices (absente Anderson) held, that one part of the award ought to be delivered to each party, so as he might take notice thereof, and that the word (*either*) shall be expounded as (*every*). But when Anderson came into Court, he doubted thereof, and the matter was referred again to arbitration. Cro. E. 448. pl. 13. Mich. 37 & 38 Eliz. C. B. Parker v. Parker.

*was delivered to the defendant also*; adjudged that the delivery ought to have been to both, for so the word (*either*) signifies in this place; for the intent of the condition, that *every of them* might have conuance thereof, and judgment for the defendant. Cro. E. 797. pl. 44. Mich. 42 & 43 Eliz. C. B. Block v. Palgrave.

18. An award was, *that the defendant should make submission, and acknowledge himself sorry for all trespasses and words, at or before the next Court, to be holden for the manor of P.* the defendant pleaded *that he went to the next Court to make his submission, and to acknowledge himself sorry &c. and was there ready to perform it, but that the plaintiff was not there ready to accept it*; per Cook and Foster, the defendant had done as much as he ought to do, and because the plaintiff was not ready to accept his submission, he was discharged; for it is personal and with intent to make them friends, and so both should be present; but Walmsley and Warburton contra, for he might have made his submission, tho' the plaintiff was not ready to accept it, as well as a man may submit himself to an award of a man who is absent; for the making it is only to shew himself sorry for what he had done and said.

Et

Et adjournatur; and the Court moved the parties to end it, because it was a trifling suit. 2 Brownl. 48. Hill. 8 Jac. B. R. Cartwright v. Gilbert.

Roll Rep. 7. pl. 9.  
S. C. adjudged for the defendant.—  
2 Bullst. 93.  
[ 128 ]  
S. C. and judgment accordingly; per tot. Cur.—Brownl. 22. Freeman v. Shields, S. C. adjudged accordingly.

19. In debt for performing the award of J. S. the defendant pleaded that *J. S. awarded, that whereas there was a suit in Chancery by the defendant against the plaintiff, that suit should cease, and that the plaintiff should stand acquitted de qualibet materia in eadem contenta; and avers, that he did not further prosecute the said suit, and that the plaintiff always afterwards stetit inde quietus.* It was objected on demurrer, that saying quod stetit quietus was not sufficient, without shewing that he was discharged thereof in fact, and how; and of this opinion was Doderidge J. on the first motion; but afterwards all the justices the plea good, and that the words (staret acquiescatus) mean only, that by that award he shall be acquitted, and it differs from an award to acquit him of a debt, for there he must procure an actual discharge; but an award that one shall be quit against the other, is a good bar in action brought by any of them, and judgment for the defendant. Cro. J. 339, 340. pl. 5. Pasch. 12 Jac. B. R. Freeman v. Sheen.

But if it be awarded to be paid in such manner, and at such times, as is expressed in the indenture, then it must be set forth at large. Vent. 87. Trin. 22 Car. 2. B. R. Anon. The like of an award for payment of money given by a will. Vent. 87. Trin. 22 Car. 2. B. R. Anon.

20. In debt on bond for performance of an award, which was to pay the rent mentioned in such an indenture, the defendant in pleading performance thereof needs not to set forth the indenture, but may refer to it generally. Vent. 87. Trin. 22 Car. 2. B. R. Anon.

It is a good performance of an award, which ordered a release to be given of all to the time of the award, if the party gives a release of all &c. to the time of the submission; for that part of the release which extends to the intermediate time is out of the power of the arbitrators. 10. Mod. 200. B. R. Arahath and Brandon.—Per Powell J. 12 Mod. 588. 589. in Case of Lee v. Elkins, cites 1 Roll Ab. 260. and Sid. 265. [365] per Windham and Hutt. 29, contra to Roll 244. [254] and Nevill J. cited Hob. 109. contra to Roll Abr. 254.

22. Award was to release to the time of the award, tender of a release to the time of submission is good. Sid. 363. pl. 13. Pasch. 22 Car. 2. B. R. Baker v. Rochester.

To construe a tender of a release to the time of submission to be good, where the arbitrators have ordered a release to the time of the award, would be to make an award, and not declare the law upon it, and then farewell all awards; per Trevor Ch. J. 12 Mod. 589. 590. in Case of Lee v. Elkins, —Show. 272. Trin. 3 W. & M. Phelps v. Alcock, S. P.

If the arbitrators award releases ab initio until the time of the award, and the party releases until the time of the submission, this is a good performance of the award; per Holt Ch. J. 1d. Raym. Rep. 116. Mich. 8 W. 3.

If it appear that a void part of an award was intended as a consideration of a thing's being done on the other side, it must be done, or

23. This diversity is to be observed where an award consists of divers things, and one of them is void, and it be expressly said, that upon performance of that void thing the other party shall do such a thing, there the doing of the void thing is a condition precedent, and must be averred before action against the other for not doing his part. But where there be several things in an award, and some are good, and others not, and it is further said that upon performance præmissorum the other shall release for the purpose, there it

it suffices to make *avermment of performance of what is well awarded*, without more. 12 Mod. 588. Mich. 13 W. 3. per Powell J. cites 2 Keb. 759. 833. [Pinkney v. Bullock.]

else here is not that advantage for the other side which

was designed for it, and he has a wrong done him by being forced to pay for a consideration which he has not; per Trevor Ch. J. 12 Mod. 590. Lee v. Elkins. Cites 2 Lev. 3. adjudged in the Case of Bargeave v. Atkins.

## (G. a) Plea in Bar.

1. DEBT upon an obligation to stand to the arbitrement, *non fecerunt aliquid arbitrium ante diem*, is a good plea, and not negative pregnant. Br. Negativa &c. pl. 17. cites 8 H. 6. 19. S. P. Br. Negativa &c. pl. 38. cites 5 H. 7. and so  
quod non deliberavit arbitrium in scriptis.

2. In *detinue of an obligation* the defendant prayed garnishment. [ 129 ] The garnishee said that it was upon condition to stand to the award of W. N. so that it be made before Easter, and that it was not made before Easter, and therefore he prayed delivery, and the plaintiff said that it was made upon condition, so that the award was made before Pentecost, before which feast they made the award, which he has performed, *absque hoc* that the submission was made, so that the award was made before Easter modo & forma; and well, and not pregnant. Br. Negativa &c. pl. 51. cites 21 H. 6. 52.

3. In *trespass* the defendant pleaded award made by A. B. &c. at W. in Com. M. such a day, that the defendant should pay to the plaintiff 20s. in satisfaction of all actions &c. which he paid &c. Aldern said the arbitrators at D. in the county of C. before the award which you mention, made an award that the defendant should pay 20s. and a horse, which horse he has not paid. The defendant maintained his bar, *absque hoc* that they made award in the county of C. as the plaintiff has alleged, before the award made at W. Prift, and the others e contra. Br. Confess and Avoid, pl. 20. cites 22 H. 6. 52.

4. In debt the defendant pleaded, condition to stand to the arbitrement of J. N. so that it be made before Michaelmas, and delivered in writing, and said that he did not make arbitrement by the day, nor delivered it in writing; notwithstanding that the one may suffice, yet because it is only one entire condition, therefore he may traverse it in all; by the opinion of the justices. But Broke makes a *quere* of this opinion; for it does not seem to be law. Br. Negativa &c. pl. 41. cites 10 E. 4. 6.

5. In debt on arbitration-bond the defendant pleads an award made of 3 things. The plaintiff cannot reply that it was made of those 3 things which he has performed, and also of another thing which the defendant has not performed, and for which he brings his action. If the defendant says the award was of 3 things only, *absque hoc* that it was of the 4th thing, it is ill; but he ought to traverse

traverse *absque hoc* that the award was made of 4 things; for an arbitrement is an entire thing which must be entirely traversed. Arg. Pl. C. 95. 2. Hill. 5. & 6 E. 6. in Case of Woodland v. Mantell.

2 Le. 155.  
pl. 189.  
Kingwell v.  
Chapman,  
S. C. and  
the bond  
was held to  
be forfeited,  
because the  
sum awarded  
is become  
a duty. —

Raym. 415.

416. S. C. cited per. Cur. as adjudged.

On a submission by A. and B. the award was that A. pay to B. or his assigns 30l. within two months, and that upon payment they should give mutual releases. B. died within the 2 months, and left the plaintiff his executrix. Adjudged that the 30l. shall be paid to the executrix, and that she ought to release all demands which the testator had against the defendant. 2 Vent. 249. Mich. 6 W. & M. in C. B. Dauncey v. Vesey.

Brownl. 49.  
Brett v.  
Averder,  
S. C. ad-  
judged ac-  
cordingly.  
—Ow. 7.  
Brett's Case,  
S. C. ad-  
judged ac-  
cordingly.  
—Le. 71.

pl. 95. Brett v. Audar, S. C. adjudged for the plaintiff.

6. Submission was of all controversies between the plaintiff and a stranger (brother of the obligor the defendant). The award was, that the brother should pay the plaintiff 30l. viz. 20l. at Easter, and 10l. at Michaelmas next. The defendant pleaded payment of the 20l. at Easter; but as to the 10l. he pleaded that his brother died before Mich. All the justices held the obligation forfeited; but would not give judgment, because the penalty (being 200l.) was great for so small a duty. Cro. E. 10. pl. 6. Kingvel v. Knapman.

7. Debt upon bond to stand to the award of A. B. who awarded that the defendant should pay to the plaintiff 20l. but appointed no certain day. The defendant confessed the award, but said the plaintiff never required him to pay it; and upon demurrer it was held no plea, because the defendant at his peril ought to pay it in convenient time, and the plaintiff need not make any request; and judgment for the plaintiff. Goldsb. 63. pl. 1. Mich. 29 & 30 Eliz. Brett v. Andrews.

[ 130 ] 8. Submission was to perform an award, *ita quod it be made before Easter, of all controversies &c.* The defendant pleaded, no award. The plaintiff replied, and shewed an award, and assigned the breach. The defendant rejoined that on 16 Mar. before the award made, he discharged the arbitrators, and so concluded as before, no award. The Court held that judgment should be for the plaintiff; for by the rejoinder the defendant had shewed that he had forfeited the bond, tho' that be another matter than is in the replication, and so he shall have judgment super totam materiam according to FRANCIS's Case. Win. 75. Pasch. 22 Jac. C. B. Westly v. King.

9. Where the submission was to an award, and in an action of debt upon the bond, and nullum arbitrium pleaded, the plaintiff replied, and set forth the award; but did not allege that it was delivered up by the arbitrators according to the submission. Upon demurrer to the replication it was held well enough, tho' the award was not alleged to be delivered according to the submission. Style 110. Trin. 24 Car. B. R. Langly v. Wybord.

10. A submission was by parol of all controversies to the award of A. and B. when they should have leisure to make it, and promised

misd each to pay the other so much if he did not stand to the award. *In case upon this promise the plaintiff averred that the defendant did not stand to it &c.* The defendant pleaded that 2 days after he revoked the submission. The plaintiff replied that 2 years after he requested A. and B. to make award, and that they had leisure &c. but he did not answer to the revocation, and therefore the replication was held ill. Sid. 281. pl. 10. Pasch. 18 Car. 2. B. R. Nugate v. Degelder.

11. In debt on an award the *statute of limitations* is no plea in bar, because it is not an action which is grounded upon lending or contract, which debts are only within that statute. Sid. 415. pl. 16. Pasch. 21 Car. 2. B. R. Hodden v. Hartridge.

Lev. 273.  
Hodgson v.  
Harris,  
S. C. the  
Court in-  
clined that  
it was not

within the statute; & adjournatur. — 2 Saund. 64. S. C. adjudged for the plaintiff. — See Fin. Rep. 384. Trin. 30 Car. 2. in Chancery, Sweet v. Hole.

12. Debt upon bond conditioned to perform an award. The defendant pleaded, no award made. The plaintiff replied, and shewed award. The defendant rejoined, and shewed other particular matters, which he averred to be notified to the arbitrators, and of which they made no award &c. And upon a demurrer it was objected that this rejoinder was ill, because the defendant did not traverse the award set forth in the replication; but Jones and Whitlock J. held that the traverse should have been by the plaintiff, and defendant ought only to maintain the bar, it being in the negative; for a negative waves an affirmative before, and *he that pleads in the negative shall not take the traverse*; and here the right order of pleading is, when the defendant pleaded, no award, for the plaintiff to reply, an award, and then to set it forth, and assign a breach (and yet the breach is not traversable), and then the defendant shall rejoin, nullum tale fecerunt arbitrium, and so maintain his bar. Palm. 511. Hill. 30 Car. 2. B. R. Farrer v. Gate.

13. An award cannot be pleaded in bar of any action, unless it appears that a present satisfaction of the demand of the plaintiff was given by the award itself, or one that was executed after, and before the action brought, or for which the plaintiff may have action.

This was cited by Treby Ch. J. in pronouncing judgment for the plaintiff, as mentioned by the plaintiff's counsel; and he said that the books go upon these differences, viz. If the award be for payment of money, and the day of payment is past, the actual payment must be pleaded, or a tender and refusal, which is a payment in law; but if the day of payment is not past, there it suffices to plead the award itself, because the plaintiff has remedy for the money by an action of debt on the award; but if the award be to do a collateral act, as to seal a bond to the plaintiff, or the like, there tho' the day is past, yet the pleading of the award shall not bar the plaintiff, if the defendant does not likewise plead that he has performed what was awarded on his part, unless he assigns some default in the plaintiff as a reason why it

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was not done. Lutw. 56. Hill. 6 W. 3. in Case of Dighton v. Whiting.

6 Mod. 221.

Boisloe v.

Baily, S. C.

and ibid.

222. S. P.

v. Bailey.

accordingly,

by Holt Ch. J. — 2 Ld. Raym. Rep. 1012. Purflow v. Bailey. 6. C. accordingly; but the Court

would not give judgment, because it was a trifling affair.

## (H. a) Submissions and Awards, by Rule of Court.

1. **WHEN** the party *submits himself* to an abitrement by an *extrajudicial course*, as by *consent*, there he cannot be sued in equity or imprisoned for non-performance of the award, unless he has at any time agreed or assented to it; but when by any court the matter is referred to gentlemen of the country, and the party will not stand to it, the Court may commit him, for upon the matter that was the award of the Court. Noy. 141. Bendick v. Thatchef.

A. and B. the parties in Court, signed an order by consent to refer their matters to arbitrators finally to determine, and their award to be final, and

2. At *visi prius* submission by rule of Court was to Hale Ch. B. but the party, against whom the award was afterwards made, revoked it before the making it. The award being tendered to him to be performed, he insisted that he had revoked it. An attachment was prayed against him for this contempt, but the Court denied it, tho' some cases were cited in which it had been lately done; for they said it was a new practice to imprison men thus without being heard; but that the party grieved might have his *action on the case* in which the whole shall be tried. Sid. 452. pl. 20. Pasch. 22 Car. 2. B. R. Tremehere v. Tresilian.

stand ratified by decree without any appeal. A. after he had attended the reference, and found they inclined to order him to pay B. a sum of money, countermands the submission; and the first question was, whether this submission was revocable? of which the Lord Keeper at first seemed to doubt, but upon argument, and producing a precedent in point, *NORTON v. ROWLAND*, 8 July, 1664, and 10th of the same month, the Judges were both of opinion that there could be no submission to an award in law or equity but what was revocable, and that nothing under a legislative power can make such a submission irrevocable, which in its nature is revocable; but it was an abuse to the Court, as it was conceived, to revoke it, for which the Court might justly lay the party by the heels; and so in this cause an attachment was awarded against him nisi causa, per the Ld. Keeper and the Master of the Rolls, assisted per Rainsford and Windham J. Chan. Cases, 187. Mich. 22 Car. 2. *Hide v. Pettit*. — 2 Freem. Rep. 133. pl. 192. S. C. and upon debate it was held, that the award ought not to be decreed because of the said revocation, by the two Judges Assistants; and the Court awarded an attachment nisi.

An attachment was granted for not performing an award made by rule of Court for referring the matter, but when the party comes in on the attachment, he may allege that the award is void, and if it appears to be so, he shall not be bound to perform it. Mod. 21. pl. 55. Mich. 21 Car. 2. B. R. *Darbyshire v. Cannon*.

3. Such award made pursuant to an order of Chancery *must be confirmed on motion*, as is done upon a Master's report, and either party has liberty to *except to it*, and then it will properly come before the Court on those exceptions. Vern. R. 469. pl. 455. Trin. 1687. *Cresly v. Carrington*.

4. A judge of *nisi prius* may, by consent of parties, make a rule [ 132 ] to refer, and then oblige them to stand to the determination, yet the *sessions* cannot so do, tho' it be by consent; yet we must allow them such a power; they may indeed refer a thing to another to examine and make a report to them thereof, but not as in this case to be finally determined by him; per Cur. 12 Mod. 87. Hill. 7 W. 3. *Holford v. Lawrence*.

5. Attachment lies not for performing an award made upon a rule of Court without a personal demand, but in such case it lies tho' the award be not legally good; aliter if possible; but the party is excused as to that part which is impossible only. 1 Salk. 83. pl. 1. Mich. 8 W. 3. *B. R. Foster v. Brunetti*.

Motion was made for an attachment for non-performance of an award; and per Cur.

there must be a positive affidavit of personal notice of award and demand of the money all at one time, because it brings the party into contempt, but if the party keeps out of the way on purpose, there must be an affidavit thereof, and of endeavour used to find him out and serve him, and it is but of late that attachments have been the means to compel performance of awards, but the old remedy was safe. 12 Mod. 257. Mich. 10 W. 3. *C. B. Anon*.

Where the party moves the Court to set aside a submission to the award of the three foremen of the jury for irregularity, the Court held, that while the matter was sub judice the non-performance was no contempt, and so denied an attachment. 1 Salk. 73. pl. 11. Pasch, 2 Ann. *Morris v. Reynolds*.

6. 9 & 10 W. 3. cap. 15. s. 1. It shall be lawful for all persons after the 11th of May, 1698, who are desirous to end any controversy, suit, or quarrel, for which there is no remedy but by personal action or suit in equity, by arbitration, to agree that their submission of the suit to the award or umpirage of any person or persons, shall be made a rule of any of his Majesty's courts of record the parties shall choose, and insert such their agreements in the condition of the arbitration bond, which agreement being so inserted, shall upon producing an affidavit thereof made by any one of the witnesses thereto in the Court of which the same is agreed to be made a rule, be entered on record, and a rule shall be made by the said Court, that the parties shall submit to, and finally be concluded by, the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission, and in case of disobedience in any of the parties, they shall be subject to all the penalties of contemning a rule of Court; and the Court on motion shall issue process accordingly, which process shall not be stopped or delayed by any order, rule, commands, or process of any other Court of law or equity, unless it appear upon oath that the award was obtained by corruption, or some other undue means.

S. 2. Any arbitration or umpirage procured by corruption or undue means, shall be deemed void, and set aside by any Court of law or equity, so as complaint thereof be made in the Court, where the rule was made for submission to such arbitrator &c. before the last day of the term next after such arbitration made and published to the party.

7. Where a rule is entered into by consent to refer a matter to the Judge of assize, there needs no motion to make his order a rule of Court, for the former rule gives it a sanction. Comb. 479. Pasch 10 W. 3. *B. R. Anon*.

1 Salk. 71. pl. 6. Mich. 12 W. 3. *B. R. Anon*. Upon the S. P.

S. P. being moved, Holt Ch. J. said, that where a matter is referred to arbitrators by rule of Court, and they make their award, we will compel a performance of it as much as if the award were part of the rule, and so a new rule is needless.

It was moved to set aside an award because the referees went on without giving him time to be heard or to produce a witness,

8. Where an award is made by rule of Court, it shall never be set aside unless there was *practise* with the arbitrators, or *some irregularity*, as want of *due notice* of their meeting, and you shall not take exception to the formality of it, but shall perform it. Per Holt Ch. J. 1 Salk. 71. pl. 4. Pasch. 10 W. 3. B. R. Anon.

Holt Ch. J. denied the diversity taken in the principal Case, and said that, the arbitrators being judges of the party's own choosing, he shall not come and say that they have not done him justice; otherwise where they exceed their authority. 1 Salk. 73. pl. 11. Pasch. 2 Ann. B. R. Morris v. Reynolds.

9. Award made by rule of Court *that money should be paid on one side and nothing awarded on the other*, the Court will not grant attachment till a *release* be tendered. 12 Mod. 234. Mich. 10 W. & M. v. Palmer.

10. A rule was made *at nisi prius* to refer a matter to the 3 foremen of the jury, and the plaintiff to have a *verdict* for his security; the plaintiff may either have an attachment for non-performance, or else judgment may be entered on such *verdict* at his election, but this last cannot be done without leave of the Court. 1 Salk. 84. pl. 3. Mich. 11 W. 3. B. R. Hall v. Mifter.

11. A submission to an award being by rule of Court, an attachment was moved for non-performance; per Cur. there ought to be *affidavit* of award demanded, and we never grant an attachment for non-payment of money upon an award *the first day*, tho' the defendant be to do the first act. 12 Mod. 317. Mich. 11 W. 3. Chandler v. Driver.

12. The Court was moved to make a submission a rule of Court, but denied, because the *affidavit set forth that the award was then made pursuant to the submission, and the award was then produced*, and Trevor Ch. J. said, that since the award was made they would not make the submission a rule of Court without seeing the award, whether it was a good and legal one. MS. Rep. Trin. 12 Ann. C. B. Anon.

I. d. Raym. Rep. 674. Cheesly v. Bailey, S. C. ruled accordingly. — Comyns's Rep. 114. pl. 75. S. C. ruled accordingly.

13. Bond of submission had this clause in the condition, (viz.) *and if the obligor shall consent that this submission shall be made a rule of Court, then the bond shall be void*; upon a motion to make this submission a rule of Court, it was opposed, because these words do not *imply a consent*, but if he would forfeit his bond he need not let it be made a rule of Court; yet because this clause could be inserted for no other end than to shew the consent of the obligor, the Court took these words to be a sufficient indication thereof, and therefore they made the award a rule of Court. 1 Salk. 72. pl. 8. Pasch. 13 W. 3. B. R. Bailey v. Cheesly.

The Court will not make a submission to

14. When it is moved to have submission to an award made a rule of Court, there ought always to be an *affidavit of notice*, because



because the act gives the Court power to examine the justice of the award; per Cur. 12 Mod. 525 Trin. 13 W. 3. Anon.

a arbitration  
a rule of  
Court, upon  
a consent

only that the award should be made a rule of Court; and it was said that the like had been often refused. 2 Barnard. Rep. in B. R. Trin. 5 Geo. 2. Anon.

15. For *snatching papers*, and so hindering the award, according to a rule of Court there ought to be attachment, if the party did not enlarge the rule and pay costs; per Holt Ch. J. 7 Mod. 8. Pasch. 1 Ann. B. R. Davila v. Dalmanfor.

1 Salk. 73.  
pl. 10. Da-  
vila v. Al-  
manza, S. C.  
but that is  
of a refe-

rence by consent at nisi prius to the 3 foremen of the jury, and before the award made, one of the parties served the arbitrators with a *subpoena* out of Chancery, which hindered the proceeding to make the award, and the Court held this a breach of the rule, and granted an attachment, nisi causa. — 12 Mod. 408. Trin. 12 W. 3. Davila v. Dalmanfor, S. C. but S. P. does not appear.

16. Submission to an award was made a rule of Court in Chancery, and an attachment issued for not performing the award. The party was afterwards found a lunatic, and died. A subpoena scire facias was taken out against the executor and heir, to carry the rule of Court into execution; but per Cur. the act of parliament directing it to be carried on by an attachment, as is done in other Courts, for disobeying a rule of Court, by the death of the party the attachment is gone, and the remedy lost. 2 Vern. 444. pl. 408. Mich. 1703. Webster v. Bishop.

Chan. Prec.  
223. pl. 182.  
S. C. says  
that because  
[ 134 ]  
this con-  
cerned all  
the Courts  
as well as  
Chancery,  
the judges  
were con-  
sulted in it.

who were all of opinion that the prosecution determined by the death of the party, and could not be revived or carried on farther. — And *ibid.* in marg. says, that tho' the award be established by the Court, yet it is not in the nature of a judgment or decree to be prosecuted, but in nature of a *complot*, which dies with the person, and so held all the judges.

17. A submission by bond was made a rule of Court, according to the act. Afterwards an award being made, the plaintiff moved for an attachment against the defendant for not performing the award, which was granted, and pending the attachment he likewise brought an action of debt upon the bond; and upon a motion that he might not proceed both ways, it was ruled that he might, because the plaintiff has no satisfaction upon the attachment; and so the defendant was put to answer interrogatories. 1 Salk. 73. pl. 12. Pasch. 2 Ann. B. R. Anon.

Tho' judg-  
ment be had  
upon the  
arbitration  
bond, yet he  
may have an  
attachment  
upon the rule  
of Court at  
the same  
time.  
30 Mod.  
337. Trin.

2 Geo. 1. B. R. in Case of Clerk v. Elwick. — But it is said to have been held contra Mich. 1 Geo. 2. in the Case of Jefferies v. . . . .

18. Bill to set aside an award made pursuant to a rule of Court in B. R. for *misbehaviour in the arbitrators* upon this case. The plaintiff and defendant entered into arbitration-bond, and submitted to make it a rule of Court, and an award was made pursuant to the submission by rule of Court; but the plaintiff not liking the award, applied to the Court of B. R. to set aside the award, and made several objections to it; and the Court being divided in opinion, a rule was made to hear counsel why the award should not be set aside, and afterwards that rule was discharged; but the Court being divided in opinion, the plaintiff could not obtain

a rule

made originally by the direction of the Court. Chan. Rep. 142. 15 Car. 1. Bishop v. Bishop.

12. An *award* made by Cordall and the bishop 40 years since decreed against the successor for the manner of tithing. Toth. 79. cites Mich. 21 Car. Colt v. Smith.

13. Award was set aside because the party did *not actually assent* to the reference. Chan. Cases 87. cites it as the Case of Brooks v. Dickens.

14. A reference was by *consent* in Court. Exceptions were taken to the award, but the Court by reason of the consent refused to look back into it, and so it was confirmed, per Ld. Chanc. N. Ch. R. 83. about 13 Car. 2. Halford v. Bradshaw.

15. The plaintiff had land descended to him from his brother who had bought it, but the defendant brought an ejectment upon a lease for 500 years; and an award being made concerning the title under which the plaintiff claimed, and the party that had the lease had not performed but kept the lease, and it came to the defendant, and the bill is to hold the land; and decreed if it had been enjoyed under the award, 14 Jac. and a perpetual injunction against the lease. 3 Chan. Rep. 20. 18 Car. 2. Poole v. Pipe.

16. The bill was *to be relieved against a bond of 1000l. penalty for the performance of an award, whereby possession and profits of lands are awarded to the defendant.* The defendant insists, that there was *no surprize* in the said award, but it was by the *direction of the plaintiff's friends*, and ought not to be set aside, which if it was, it would involve many suits; and insisted, that the said award is in the nature of an agreement, and ought to be performed. The Court taking notice that the award in question was not made by the order of this Court, but that it proceeded from the *voluntary submission* of the parties; two judges being chosen by themselves, declared their opinion that they saw no cause to decree the award to be set aside, nor on the other side to confirm, or to relieve the plaintiff, but ordered both bills to be dismissed, the plaintiff electing to go to law. 2 Chan. R. 34. 21 Car. 2. Eyre v. Good & al.

17. The plaintiff's *suit is to have the benefit of an award*, to which the defendant demurred, and says, *that the plaintiff ought to take his remedy at law.* The Court over-ruled the demurrer. 2 Chan. R. 30. 21 Car. 2. Alford v. Pitt.

18. A *submission to an award* by consent of parties by order of this Court is revocable; for nothing under a legislative power can make such a submission irrevocable which in its nature is *revocable*, but an attachment will be granted. Chan. Cases 185. Tr. 22 Car. 2. Palmer v. Whettenhall.

*Bond of 200l. penalty to stand to an award entered into by A. and B. A.*

*counter-manded* the reference, the Court ordered an *injunction* against the penalty, and a trial directed to try what the defendants were damaged by the countermand. Nelf. Chan. Rep. 148. 23 Car. 2. Wilson v. Barton.

19. An award about calling a butcher a bankrupt was referred to a trial at law because of the *excessiveness of damages* given on the award. 3 Ch. R. 76. 1671 or 1672. Cooper v. the Butcher of Croydon. [ 137 ] Arg. S. C. cited Vern. 157. in pl. 147. — 3 Chan.

Rep. 82. cites S. C. — 2 Vern. R. 251. in pl. 238. S. C. cited, but says there was another reason, viz. it was to be referred to *indifferent persons*, and it appeared that one of the referees was the butcher's *cousin*, and therefore also the award was set aside.

20. Submission to 2, an award by *one only* is not good. Fin. R. 87. Hill. 25 Car. 2. Sowton v. Spry.

21. An award that if the plaintiff performed it within such a time he should have the *gross*; he did not perform it within the time limited, so no relief. Fin. R. 22. Mich. 25 Car. 2. Ewes and Reeve v. Blackwall.

22. An award being made of things submitted was set aside. Fin. Rep. 161. Mich. 26 Car. 2. Warren v. Green, Hurtnal, & al. Jones v. Crawley, S. P. accordingly.

23. An award made that defendant should convey such a parcel of ground to the plaintiff as was agreed on; defendant pleads, that before the submission he and his wife were jointly seised thereof, and that she is *not a party* to the submission, besides that the award itself is void because of the *uncertainty thereof*; for a piece of ground is to be conveyed *without mentioning what estate* therein; plaintiff's counsel agreed that this was a good bar to the award, yet the Court decreed defendant to convey according to the agreement, and the Master to settle it. Fin. Rep. 180. Mich. 26 Car. 2. Berry v. Wade.

24. Finch C. said, he would never decree an award that should bind an *infant*. Chan. Cases 280. Trin. 28 Car. 2. Cavendish v. ....

25. Award that guardian procure an *infant* to convey, and give bond for that purpose was set aside as unreasonable; per Finch C. Chan. Cases 279. Trin. 28 Car. 2. Cavendish v. ....

26. Arbitrators promised to *hear witnesses*, but making the award before they had so done, the award was set aside. 2 Vern. 251. in pl. 238. cites it as the Case of Pitt v. Dockwra. 2 Show. 508. pl. 472. Hill. 2 & 3 Jac. 2. B. R. the

S. C. but S. P. does not appear. — If an award made a *rule of Court* by consent of parties be *bad in point of law*, yet the Court will compel the parties to perform it, unless there be some *corruption*, or one party *not heard &c.* per Holt. Cumb. 303. Mich. 6 W. & M. in B. R. Skip v. Chamberlain.

A hard award made *without bearing one of the parties* was denied to be set aside, because he had *notice*, and might have been heard if he pleased; and as to the *hardship*, the arbitrators were judges of their own choosing, and therefore decreed that the bill stand dismissed with costs. 9 Mod. 63. Mich. 10 Geo. 1. Waller v. King.

27. Arbitrator promised not to make his award till Smith (who was not well) should come abroad; Lord Nottingham inclined for that reason to set it aside, but it ended by compromise. 2 Vern. 251. pl. 238. cited as the Case of Smith v. Coriton.

28. An award made, and a *release* given pursuant thereunto, shall not affect such as are *no parties* to it. Fin. R. 441. Hill. 32 Car,

Car. 2. Davy v. Harvey, executors of Audley v. Rea, Beaufoy, and al.

Vern. 157. pl. 147. S. C. and the bill dismissed after long debate; Ld. Keeper said, that where there appears a ma-

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nifest error in the body of an award, there in some Cases there may be relief against it in Chancery;

but where the error does not appear without unravelling of it, and examination to matters of account, he thought it not relievable here. Note, in this case the umpire himself, who made the award, tho' excepted to, was read as a witness.

The submission was by bond, and the award was not binding by form of law, by which the plaintiff was to pay the defendant 900l. and to seal a release to the defendant, and the defend-

ant was to assign several securities which he had from the plaintiff. The plaintiff sold some lands to raise the 900l. expecting the defendant would receive it, as he gave him intimation he would, and tendered him the 900l. and a release executed by the plaintiff; and tho' there was no other execution on the plaintiff's part of the award, and tho' the award was *extrajudicial*, and *not good in strictness of law*, yet the Ld. Chancellor decreed it should be performed in specie. 2 Vern. 24. pl. 16. Pasch. 1687. S. C. — But where a bill was exhibited to have an execution of an award, which was performed by neither party, and the defendant demurred, because there was no precedent that a court of equity had ever carried such awards into execution, and the demurrer was allowed. Abr. Equ. Cases 51. pl. 9. Mich. 1704. at the Rolls, Bishop v. Webster.

29. To set aside an award made on a reference by rule of Court in a dispute of waste done by tenant for life were alleged 1. Excessiveness of damages, 2. Misdemeanour in the umpire, viz. that before the umpirage made, *umpire declared he would not meddle*, and after umpirage he declared he made it for fear he should be arrested; whence his counsel inferred that he had been *menaced*, 3. That after the submission, plaintiff had *repaired the premises*, and proved repairs made, and that 40s. would perfect the repairs, and therefore prayed a new trial; defendant insisted it ought not to be set aside, without *fraud or partiality* proved; that the umpire's saying he would not meddle was some time before the time he was to make his umpirage, and defendant had *notice to attend*, which he did not, so that the umpire had no notice of the reparations &c. and if he had, it was not material to avoid the award. North K. dismissed the Bill. 2 Chan. Cases, 140. Pasch. 35 Car. 2. Brown v. Brown.

30. The suit was to have a voluntary award performed, the defendant insisted, it being a *voluntary submission* of the parties, and the reference *not directed by this Court*, the award was void, and ought not to be performed, and demurred by the plaintiff's will. The Master of the Rolls ordered precedents, and upon reading the award, declared he saw no cause to relieve, but dismissed the bill. This cause was re-heard before the Ld. Ch. J. Jeffries, who declared he saw no cause why the said award should be impeached; but it was fit that the same should be performed, being *in part executed and assented unto*, and decreed the same to stand confirmed, and the defendant to perform the same. 2 Chan. R. 304. 36 Car. 2. Norton v. Mascall,

31. Where a submission was to arbitrators, *who differed as to the sum to be allowed*, and *one was for giving 55l. and the other insisted on giving 95l. the servant of the umpire before the umpirage made by his master, gave out that he was sure his master would give 150l. which afterwards he did*. The Court looked upon this as an evidence of *fraud and corruption*, and therefore decreed the arbitration bond to be delivered up. 2 Vern. 101. pl. 95. Pasch. 1689. Anon.

32. Equity

32. Equity will not *decree* an award, unless it be of all matters referred, be the reference with an *ita quod* or not. Chan. Cases 186. Mich. 22 Car. 2. Hide v. Pettit.

Chan. Cases  
87. Pasch.  
19 Car. 2.  
Colwell v.  
Child, S.P.

allowed. — But per Lords Commissioners, if there be an *ita quod* 'tis not good, otherwise 'tis good for so much as it settles. 2 Vern. 109. pl. 106. Mich. 1689. Hide v. Cooth.

33. There being an *adversary suit* between A. and B. the same was referred to J. who made an *award*, which was afterwards confirmed by the Court. It appeared afterwards, that A. at the time was a bankrupt, tho' not known then to be so; a commission of bankruptcy being afterwards taken out, the assignee brought a bill to set the award aside, but there appearing no fraud or collusion, the Court denied it. 2 Vern. 229. pl. 209. Pasch. 1691. Whitacre v. Pawling.

At the end  
of the Case  
is added viz.  
Quere if  
the decree  
upon a re-  
hearing was  
not reversed

34. Award was, the arbitrators being interested in the thing of which the award, was made, and therefore set too great a value thereon, and in five days after the award, the money awarded was attached by the arbitrators, for money owing them by the defendant. 2 Vern. 251. pl. 238. Hill. 1691. Earle v. Stocker.

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35. Award was set aside for partiality in the arbitrators, as where the submission was to 3, and because one did not agree with the other 2, the 2 had meetings by themselves; that alone is sufficient to vitiate the award, and then to let one of the parties be present at their private meetings, and admitting him to be heard to induce an alteration in the award, and industriously concealing their meetings from the other, and leaving the drawing up the award to the defendant's attorney, are proofs of the partiality, and decreed at the Rolls to be set aside; and confirmed per Wright K. because the proceedings of the arbitrators were partial and unfair. 2 Vern. 514. pl. 463. Mich. 1703. Burton v. Knight.

36. If it appears that the arbitrators went upon a plain mistake, either as to law or fact, it is an error appearing in the body of the award, and sufficient to set it aside; but plaintiff failing to make out his case by proof, the bill was dismissed per Cowper. C. 2. Vern. R. 705. pl. 626. Mich. 1715. Cornforth v. Geer.

Where  
there was a  
plain mis-  
take of 250l.  
yet no re-  
lief; cited  
per Serjeant  
Maynard.

Vern. R. 158, as in Case of Robins v. Grantham. — And per North K. where the mistake appears not, without examining to matters of account, 'tis not relievable. Ibid. pl. 147. Pasch. 1683. In Case of Brown v. Brown.

37. A. seized in fee of a house, devised it to M. his wife, for life, remainder to his 6 daughters in fee equally. Upon a trial in an action brought by M. against J. S. for stopping lights, all matters in difference as to the title to the house were referred to arbitrators, who awarded J. S. to pay costs, and also 155l. for the purchase of the house, and M. on payment to convey in fee. J. S. paid the costs, and brought a bill against M. to convey and procure the daughters to join; some of the daughters were examined as witnesses by the defendant, the mother, wherein they swore, that they were willing to join in the conveyance. The mother

mother died, and J. S. brought a new bill against the daughters, and the husbands of 4 that were married, and one that was unmarried, in order to compel them to convey, and to procure an infant heir of one of the daughters deceased to convey when of age. Ld. C. King said, if the daughters had been sole, he should upon such consent have decreed them to convey, but *all but one of them being under coverture, and one being dead leaving an infant heir, not party to the bill*, their answers could not bind themselves, much less their husbands, as to their inheritance, and it is impossible to bind the infant heir; and dismissed the bill as to such part as prayed a conveyance. 2 Wm.'s Rep. 450. Hill. 1727. Evans v. Cogan.

Quere the Case of WARD v. WALKER, if the bill there was not brought within the two months! —Barnard Rep. in B. R. 152 Pasch. 2. Geo. 2. ALARDES v. CAMBEL & [ 140 ] WIL- LIAMS in the Exchequer says the opinion of the Chief Baron was, that Courts of Equity are not confined to allow of exceptions to awards within the time prescribed by the act of W. 3. as Courts of Law are; and that Hale and Comyns barons agreed, but that Carter Baron differed.

38. Bill was for an account and to impeach an award made between plaintiff and defendant Bercher, touching a partnership in buying and selling diamonds in France in 1719, and the bill was against the arbitrators, as well as the party; defendant B. (the party) as to the account &c. pleads the award &c. and the arbitrators as to a discovery of several particulars prayed by the bill, and as to any relief against them, pleads the submission, and that by consent it was made an order of this Court &c. Ld. Chancellor allowed the plea of the party of the award to the account &c. but over-ruled the plea of the arbitrators, as covering too much (viz.) several particulars which might tend to shew a partiality &c. in their proceedings &c. Nota, in debate of the Case it was argued, that an award made upon a submission pursuant to the statute W. 3. could not be set aside, but for partiality or corruption in the arbitrators complained of within two terms after the award made, and in the present case, tho' the act of parliament was not particularly relied upon, yet it appeared that the submission was made an order of this Court, and that was said to be sufficient to bring it within the statute; but the bill was filed within a few days after, so that no advantage could be taken of not complaining according to the act within 2 terms &c. and it was urged, that tho' the 2 terms do elapse before any complaint, yet that does not oust this Court of jurisdiction and power to set the award aside at any time for misbehaviour &c. And a Case of WARD AND WALKER was cited by Mr. Attorney General, of an award to set aside by Ld. Macclesfield, which had been made under a submission a rule of Court. But Ld. Chancellor seemed to doubt of, as thinking the act of parliament giving 2 terms &c. concluded all Courts, and all manner of equity, &c. MS. Rep. Mich. 4 Geo. 2. Canc. Godfrey v. Bercher.

39. A bill was brought against the defendant a supercargo for an account in 1721, who in his answer set forth that there was a submission and award, and releases given. A bill was now brought to set aside the award, at least so far as related to a particular parcel of goods charged to have been sold by him to one J. S.

J. S. abroad, to the amount of 10,000l. setting forth, that plaintiffs had received an account of this transaction since the award, and suggest that defendant had concealed all this from the arbitrators, omitting it out of the account laid before them, and that the sale of these goods was entered in a particular book &c. The defendant as to discovery and relief pleaded the former proceedings, award, releases &c. Ld. Chancellor said, that the rule that awards cannot be set aside, unless for partiality or corruption in arbitrators, is too narrow; for if there be fraud made use of by either of the parties to mislead the arbitrators, that is a reason. So in case of a judgment at law or a decree here. And the facts charged amount to this, as suppressing the book &c. and omitting goods out of account laid before arbitrators. Defendant denies suppressing the book by answer, but if he did sell and not enter, or not disclose, that amounts to the same thing, and the defendant is affected by this as well as the other. The plea goes too far, being to relief as well as for discovery, for if defendant be not bound to discover, yet if plaintiffs can prove their case, it is too much to say they are not entitled to relief. MS. Rep. Hill. Vac. 15 March, 1734. S. S. Company v. Bumstead.

For more of Abitrement in general, see *A cord*, and other proper Titles.

## Affets.

[ 141 ]

(A) What *Things* shall be Affets to an Heir in Debt. Fol. 269.

[1. LAND by descent in *ancient demesne* shall be affets in debt. 7 H. 4. 14.] Br. Affets per Descent, pl. 11. cites S. C. &

S. P. by Hank. Note, there is franktenement and base tenure in ancient demesne.

[2. A *reversion in fee expectant upon an estate tail* is not affets, because it lies in the will of the tenant in tail to dock and bar it at his pleasure. Mich. 12 & 13 Eliz. between TERLIN AND TRAFFORD] \* Roll Rep. 357. cites S. C. — Roll Rep.

234. in pl. **TRAFFORD** adjudged, cited Co. 6 Bredeman 58. b. and Mudd. may 42.]

5. S. P.

and cites

12 Eliz.

Trap's Case, but seems to intend S. C. ——— 2 Mod. 50. Arg. S. P. ——— 3 Lev. 287. Pasch. 2 W. & M. in C. B. Kellow v. Rowden. ——— 1 Mod. 257. S. C. & S. P. accordingly. ——— Carth. 126. S. C. and S. P. ——— Show. 244. S. C. ——— Freem. Rep. 498. pl. 672. Hill. 1690. B. R. Round v. Kellow, S. P. accordingly. ——— So of a remainder after an estate tail, and if an action is brought against him, he may plead riens per descent, Arg. 7 Mod. 176. ——— But a reversion expectant on an estate for life is quasi assets, and ought to be pleaded specially by the heir, and the plaintiff in such case may take judgment of assets cum acciderint; per Holt Ch. J. quod nota. Carth. 129. in Case of Kellow v. Rowden. ——— Reversioner expectant on an estate for life bound himself and his heirs in a bond, and died, living the tenant for life. Adjudged that this reversion shall be assets in the hands of the heir. Ld. Raym. Rep. 53. Trin. 7 W. 3. C. B. Rook v. Cleyland.

Br. Assets  
by Descent,  
pl. 8. cites  
S. C.

[3. If lands descend to an heir, this is assets *before entry*, for he may enter when he will. 42 C. 3. 10. b.]

4. A *covenant conveyance* that assets shall not descend is not good; per Cur. 3 Rep. 78. b. cites 34 E. 1. Tit. Guaranty 88. and 19 E. 2. Tit. Assets 3. and 31 E. 1. Tit. Voucher 301.

Copyholds  
are no assets,  
per Lord  
Keeper. 2  
Chan. Cases  
201. Mich.  
26 Car. 2.

5. *Copyhold* inheritances, or such customary inheritances shall not be assets to charge the heir in action of debt upon an obligation made by his ancestor, tho' he binds himself and his heirs. Resolved. 4 Rep. 22. a. Mich. 23 & 24 Eliz. C. B.

S. C. cited Arg. 1 Salk. 188. pl. 7. towards the bottom.

6. A *right (without any estate in possession, reversion or remainder)* for which a good remedy is given by action, is not assets till recovered and reduced to possession. 6 Rep. 58. a. b. per Cur. Hill. 4 Jac. C. B. in Brediman's Case.

S. P. by  
Coke Ch. J.  
Cro. J. 142.  
pl. 20. in  
Case of Bre-  
deman v. Bromley, S. C. ———

5. A *rent-sock* which descends, for which the heir has no remedy, is not assets, till seisin had; per Cur. 6 Rep. 58. b. Hill. 4 Jac. in C. B. in Brediman's Case.

S. P. but it is not because it is not an inheritance, but because there is no remedy for it, and after seisin it is assets. Arg. Litt. Rep. 44. cites 11 E. 3. 14.

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But now by  
the Stat. 29  
Car. 2. cap.  
3. the same  
is *indefeasible*  
in the hands  
of the heir,  
if he comes to it as a special occupant, as assets by descent; and if no special occupant, then it shall be assets in the hands of the executors or administrators of the party. ——— See Oldham v. Pickering.

8. If one *demised lands to A. and his heirs during the life of J. S.* or if *tenant for life grants his estate to A. and his heirs, and A. dies*, his heir shall take only as special occupant, and he shall not be charged hereby as heir in an action of debt. 10 Rep. 98. a. Mich. 10 Jac. in Seymour's Case.

9. *Lands in Ireland* are assets to satisfy a bond debt in England, but it is otherwise of lands in Scotland. Arg. Vern. 419. cites it as resolved in Evans and Ascough's Case. Lat. 234. and 6 Rep. Dowdale's Case.

2 Freem.  
Rep. 184.  
pl. 259. S. C.  
says, that

10. *Lands were purchased by A. but conveyed to A. and B. but B. to take nothing.* A. dies, B. is decreed to convey to the heirs of A. These lands, being trust lands, are no assets in equity, though



though the *trust* be decreed in equity. Chan Cafes 12. Trin. 14 Car. 2. Bennet and Brownlow v. Box & al. the ancestor's incumbrances on the lands were so great, that the revenue would not pay the interest, for which reason resolved to be no assets in equity. — S. C. cited by Ld. Keeper. Chan. Cafes 1:8. Pasch. 21 Car. 2. in Case of Prat v. Colt, where it was held, that a trust of lands was no assets. — 2 Freem. Rep. 139. pl. 177. S. C.

11. If *cestui que trust* binds himself and his heirs in a *bond*, this *trust* is not assets to the *heir*, tho' questioned in Ld. Chancellor Hide's time, but clearly the *trust of a lease for years* is assets to charge an executor in equity. 3 Ch. R. 37. Pasch. 21 Car. 2. in Scacc. in Case of Attorney General v. Sands. Nelf. Chan. Rep. 134. in S. C. — 2 Freem. Rep. 131. pl. 157. Pasch. 21 Car. in

Scacc. S. C. & S. P. in the same words. — But by 19 Car. 2. cap. 7. the *trust of an inheritance* is made assets at law, but the *trust of a term* is not, and by a clause where judgment is obtained against the testator the Sheriff may take the trust estate in execution. 2 Vern. 248. pl. 232. Mich. 1691. King v. Ballet.

*Land purchased in trust* was decreed to be assets to pay judgments. 2 Chan. Rep. 143. 30 Car. 2. Grey v. Colvill. — But Vern. 172. pl. 167. Trin. 35 Car. 2. Creed v. Covile, S. C. Ld. Keeper doubted, whether the *trust of an estate in fee descended on the heir* is assets in equity to the satisfaction of a debt by *bond* in which the heir is bound?

*Trust of a surplus* where lands are devised for payment of debts &c. if it be a resulting trust to the heir, and is not devised away, is assets by descent in the hands of the heir upon the statute of frauds and perjuries; per Pratt Ch. J. 9 Mod. 190. in Case of Roper v. Ratcliff.

12. *Feoffment* of a manor, excepting and reserving *black acre* to himself for life only habend. except before excepted, to the use of A. in tail. Resolved there is no limitation of use of black acre, so it *results and descends*, and is assets. Lev. 287. Pasch. 22 Car. 2. B. R. Wilfon v. Armorer. Raym. 297. S. C. — Vent. 78. S. C. adjournatur, and ibid. 87. S. C. adjournatur, but accordingly.

ibid. 106. S. C. adjudged that it descended. — 3 Salk. 157. pl. 2. S. C. adjudged accordingly.

13. Mortgager and mortgagee; the mortgager died, and the *heir of the mortgager and mortgagee join in a sale* of those lands; quære, whether the *money that comes to the hands of the heir by this sale* shall be assets to charge him in equity? And per Finch, Ld. Keeper, it shall not, no more than he shall be charged at law after alienation bona fide. Freem. Rep. 303. pl. 369. Hill. 1673. Anon.

14. Where the *heir takes by a will with a charge* as paying 20l. &c. he does not take by descent, but by purchase, and therefore this is no assets; per North Ch. J. and Atkins J. 2 Mod. 286. Hill. 29 & 30 Car. 2. C. B. Brittam v. Charnock. Freem. Rep. 248. pl. 263. Brittain v. Charnock, S. C. the

Court inclined that the heir was not in by descent, but as a purchaser, by reason of the charge of the 20l. but they seemed to take this rule, that whosoever the heir hath his election to take. [ 443 ] one way or the other, and that he comes to the estate both ways alike, there the law for the benefit of creditors adjudges him in by descent rather than by purchase and devise; but here unless the devise be void, he cannot take but upon the payment of 20l.

15. *Reversionary lands purchased in the names of A. and B.* after the death of C. who has estate for life in the said lands, were decreed to go towards satisfaction of judgments. 2 Chan. Rep. 145. 146. 30 Car. 2. Grey v. Colvill.

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16. Where

Ibid. 156. in Langton's Case, Ld. Keeper said that there is no difference in reason. Where the

inheritance is in trustees, and a man has a term in his own name which is limited to attend the inheritance, and dies indebted, the term in that case shall be liable to his debts; for it is assets at law; per Ld. Chancellor; but he said that if one seized in fee raises a term, and lodges it in trustees to attend the inheritance, and afterwards dies indebted, he never heard that that term should be made assets, but he had heard it often denied. Vern. 141. in pl. 137. Mich. 1685. — 2 Vern. 54. 55. Pasch. 1683. Arg. says that in such case where the inheritance is taken in the name of trustees, it never was pretended but that the term should be assets. — Chan. Prec. 247. Pasch. 1705, the Matter of the Rolls cited Ld. Hale's opinion Mich. 20 Car. 2. in Sir JOHN SAUNDERS'S Case, that a waiting term shall be assets if it attends an inheritance in fee-simple; but not if it attends an estate tail, which is not subject to debts in equity. — S. P. by Hale Ch. B. Hardr. 48. Mich. 20 Car. 2. in Seacc. in Sands's Case. — 11 Mod. 5. pl. 22. Pasch. 1 Ann. B. R. has a quere if tenant in tail contracts debts by bond, and dies, and it can be made appear that some of his ancestors that bought the estate found an old mortgage upon it for a long term of years, which was kept on foot to wait on the freehold and inheritance, whether such lease in equity would not be assets in the hands of the heir in tail, because it is equity only makes such leases descend, and it is the highest equity that a man's debts should be paid? — 9 Mod. 127. 126. Arg. cites it as resolved in the case of the creditors of the Earl of Pembroke, by simple contract, that they should be paid out of an unmerged term he had in him, because such a term was a chattle liable to their demands; but that if the term had been in a trustee for the earl, it had been otherwise.

In such case the heir aliened the real estate before a bill brought.

The question was, if the

obligee was relieviable here against the heir and purchaser on the statute to prevent fraudulent devises; or if he was to be left to law to get judgment first? Per Ld. Keeper Wright, that statute being introductive of a new law, the relief on it must be at law, and that a bond-creditor must first have judgment at law, before he can redeem a mortgage for years, tho' it might be otherwise in case of a mortgage in fee. Chan. Prec. 108. pl. 119. Trin. 1701. Bateman v. Bateman. — Note, Chancery at this day gives relief upon the statute of fraudulent devises in such case. Ibid. added as a note of the reporter.

The very equity of redemption of a mortgaged term is assets to pay simple contract debts; per Ld. Macclesfield. Wrym's Rep. Hill. 1721. in Case of Coleman v. Winch.

The equity of redemption of an inheritance is not assets at law, because the estate is for-

feited; but the heir having a right in equity, that ought in equity to be liable to satisfy a bond debt, and if the heir has aliened or released his equity of redemption, to prevent the creditors the satisfaction of their debts, the Court will follow the money in the hands of the heir or his executor.

Vern. 61. pl. 52. Pasch. 1688. Sawley v. Gower. — Chan. Cases, 152. S. P. but no decree. M. 21 Car. 2. Trevor v. Perrier.

Vern. 455 pl. 427. Pasch. 1687. S. C.

19. The heir claiming under a voluntary settlement sells the land. The purchaser before his purchase had notice that there was a bond, but there was no original filed; and before the commence-

16. Where a lease for years is to wait on the inheritance, it shall be assets as to debts, as well where the interest of the lease is in the hands of a stranger, and not in the owner of the inheritance, as when it is in cestui que trust of the inheritance, and the interest of the inheritance in a strange trustee; per Ld. Keeper. 2 Chan. Cases, 152. Mich. 35 Car. 2.

17. Upon a question if the equity of redemption of a mortgage for years of an estate in fee be assets, the Ld. Chancellor's present opinion was, if there was a surplus beyond the mortgages, it should be assets to answer bond debts. Vern. Rep. 410. pl. 384. Mich. 1686. Cole v. Warden.

18. If the equity of redemption of a mortgage in fee, since the statute of frauds and perjuries, should be assets in equity to satisfy bond debts, the Ld. Chancellor inclined that it was; but respited his decree till the Master had reported a state of the Case. 2 Vern. Rep. 411. pl. 385. Mich. 1686. Plucknet v. Kirke.

commencement of the suit he had covenanted to pay the residue [ 144 ] of his purchase. On a bill filed the question was, if the money in the purchaser's hands is liable to the payment of this bond debt; and the Court thereupon inclined to dismiss the plaintiff's bill. 2 Vern. Rep. 44. pl. 40. Pasch. 1688. Sagittary v. Hide.

20. A. seised in fee, demised to trustees for raising 1500l. a year for his wife's jointure, *who re-demise to him for a lesser term*, paying a pepper corn. This term so re-demised, being raised only for a particular purpose, shall not be assets for payment of other debts than the inheritance would have been liable to; per 2 justices, the Master of the Rolls, and Ld. C. Jefferies. 2 Vern. 52. pl. 50. Pasch. 1688. Baden & al. v. the Earl of Pembroke & al.

2 Vern. 215. pl. 196. S. C. Hill. 1690. and cites S. P. in S. C. to have been decreed accordingly in 1688. and per Lords Commissioners, the

*mortgaged terms* derived out of the earl's inheritance are assets, and liable to bond debts only, and not to debts by simple contract. — Nelf. Chan. Rep. 161. Bladen v. the Earl of Pembroke, S. C. the Court held accordingly. — 3 Chan. Rep. 217. The Earl of Pembroke v. Bowden, S. C. but they advised till the next term.

22. A. having a *lease for 3 lives to him and his heirs* from the church, and *mortgaged it for 99 years, if the 3 lives lived so long*, and died, the mortgage being forfeited, decreed this mortgage term, which would not have been assets at law, to be sold for the payment of debts. Arg. 2 Vern. Rep. 54. pl. 50. Pasch. 1688. cited as decreed in Ld. Nottingham's time in Took's Case.

23. A. seised in fee, *mortgages for 99 years*. The *equity of redemption* has always in this Court been adjudged assets. Arg. 2 Vern. 55 Pasch. 1688. In Case of Baden v. the Earl of Pembroke.

An equity of redemption is every day made assets in equity.

Arg. Vern. 173.

24. The judgment against an heir, who has a *reversion in fee* descended to him, is only of assets *quando acciderint*; and the creditor cannot by bill in equity compel the heir to sell the reversion, but must expect till it falls. 2 Vern. 134. pl. 132. Hill. 1690. Fortrey v. Fortrey.

25. A. on sale of lands takes a *bond from the purchaser to pay* any sum or sums of money not exceeding 500l. *as A. should by will appoint*. Per Cur. A. having *power to dispose* of the 500l. must be looked on as part of his estate, and decreed it to be assets liable to the plaintiff's debts. 2 Vern. Rep. 319. pl. 306. Trin. 1694. Thomson v. Towne.

Chan Prec. 52. S. C. Pasch. 1695. that A. was indebted to B. in 300l. and B. being his near

kinsman, A. settled his estate of about 150l. a year on himself for life, the reversion to B. and his heirs; and B. as a consideration of such settlement, gave a bond to J. S. the defendant, by direction of A. to pay 500l. to such person or persons as A. by will should appoint. A. by will reciting the bond to be in trust for him, gives the 300l. to the said J. S. and makes him executor, and directs him to pay 50l. to D. to bind him apprentice, and 50l. more to set him up, and 20l. a year to E. for life. J. S. sues the bond. B. brought his bill to subject this 500l. to be assets to pay the 300l. and 70l. more due to him from A. The Ld. Keeper decreed the 500l. to be assets to pay B.'s debt, and he to retain so much to satisfy himself, and pay J. S. the residue; and on appeal to the House of Lords this decree was confirmed. — S. C. cited by Ld. Keeper as decreed and affirmed accordingly. 2 Vern. 466. Mich. 1704. in pl. 425.

26. In *debt* upon bond brought *against* the defendant as *heir* to his father &c. and *riens per descent* pleaded, the plaintiff replied, *assets*, and *issue* thereupon. And the evidence was, that the obligor, the defendant's father, *devised to the defendant, his son and heir, certain messuages in Exchequer-alley in fee, but chargeable with an annuity or rent-charge payable to the defendant's mother.* And it was held by Holt Ch. J. that these messuages descended to the defendant, and were *assets*; for (by him) the *difference* is, *where the devise makes an alteration of the limitation of the estate* [ 145 ] *from that which the law would make by descent, and where the devise conveys the same estate as the law would make by descent, but charges it with incumbrances.* In the former case the heir takes by purchase, in the latter by descent. *Ld. Raym. Rep. 728. Trin. 13 Will. 3. B. R. in Guildhall, London. Emerson v. Inchbird.*

Chan. Prec. 232. pl. 193. S. C. because he had a resulting equity in it, which he might devise, but not to take place of creditors, and he had before made an appointment which satisfied his power, by appointing it a collateral security.

27. A. having a power to charge 3000*l.* on his estate for such purposes as he should think fit, by deed appoints the 3000*l.* as a collateral security for quiet enjoyment of an estate he had sold; but the appointment to be void, if no incumbrance appears. A. *devised it to his daughter.* The creditors of A. brought a bill to have the 3000*l.* applied to payment of debts, and decreed accordingly; per Wright *Ld. Keeper. 2 Vern. 465. pl. 425. Mich. 1704. Lassels v. Cornwallis.*

28. A. being seised of the *trust of an advowson in gross in fee*, dies indebted by specialty &c. The creditors bring a bill against the heir at law and the trustees of the advowson, and pray a sale of the advowson. The heir at law insisted that the advowson was not *assets*. It was argued for the plaintiff that an advowson is *assets at law*; that it is an estate of inheritance, descendible, valuable, and saleable, &c. But for the heir at law it was argued, that an advowson is not *assets at law in an action of debt*, and cited Anderson Ch. J. in *Sir EDWARD CLEER AND PEACOCK'S CASE, Cro. E. 359*, tho' otherwise *in a formedon* to bar the warranty; and that the reason of the difference seems to be, that the *assets* to make the warranty a bar in a *formedon*, are to be considered according to the *gross value* &c. whereas upon a judgment in debt against the heir the *assets* are to be extended according to the *annual value*, and there is no annual value of an advowson, and therefore cannot be extended. Tenant by elegit is to hold quousque he is satisfied, according to the yearly value &c. and how can that be when there is no yearly value? and when is it that the debt shall be said to be satisfied, and the party have the advowson again? That there are other circumstances of inheritances which are not *assets at law*, as copyholds, estates pur auter vie, before the statute of frauds &c. Farther in a *formedon* the bar and satisfaction by warranty and *assets* descended, is not by holding the *assets* and profits to be taken, but the thing itself. *i. e.* the *assets* are delivered in satisfaction absolutely, according to the *gross value*;

value; whereas in debt the lands &c. are always found, and delivered *clari valoris* &c. To this it was replied, as to the objection and instance of the copyhold, that is not assets, because in the eye and notion of law it is but an estate at will, tho' custom has now fixed and made it in some respects an estate of inheritance, but yet the tenure is *ad voluntatem domini*; and another reason, because the lord may not have a tenant put upon him contrary to his will &c. and as to the case of estates *pur auter vie*, the heir took not properly by descent, but as special occupant &c. And as to the distinction of an advowson's being assets in a formedon, and not in an action of debt, it is founded upon the single authority of what Anderson said obiter, and wherein, as to the point then in judgment, the whole Court was against him. Co. Litt. 374. b. is general that it is assets. It is true it is there mentioned with reference to warranty to create a bar in formedon; but the reason there given, and the books there cited, prove it to be assets generally, because valuable, and shew how it may be valued annually; and if a value, as admitted, may be put upon it in gross, as in the case of warranty, why may it not by proportion admit of a yearly value? as suppose an advowson worth 20l. then one-twentieth may be said to be the annual value, and the objection of its producing no annual profits [ 146 ] will not hold, because that proves likewise that no value ought at all to be put upon it; and the sole difficulty here is the manner of valuing or charging; but that is no difficulty in this Court, which will decree a sale of assets descended as a more ready and compendious method of satisfaction; and even at law since the statute of W. 3. against fraudulent devises, if the heir aliens the assets he is chargeable according to the gross value &c. wherefore &c. Ld. Chancellor, as to the point of the advowson being assets &c. held that if it be not assets at law this Court would not make it so, because that would be to alter the law &c. and seemed that as a gross value (as it is admitted) may be put upon it, so it may be capable of a valuation *per annum* &c. At another day Ld. Chancellor declared his judgment, and held that the advowson was assets, and accordingly decreed it to be sold &c. He held that it was a rule that all lands, tenements, and hereditaments were extendible; and that an advowson was so in the Case of the King, he cited Sir W. Jones 24. An advowson was a thing valuable, and lay in tenure, and might be held by knights service &c. He referred to Fleta and Britton. The 23<sup>d</sup> of March following this decree was affirmed in the House of Lords. Eyres Ch. J. of C. B. Price J. and Comins B. being the only judges in town, attended; and being asked their opinion, whether an advowson in gross was assets in such case at law, declared it was; and the House did not divide. MS. Rep. Mich. 1730. Robinson v. Tong.

## (B) What Estate.

If a man *leaves for* [1. *I* ought to be *in fee*. 42 E. 3. 10. b.]

*life rendering rent*, and the lessor dies, the heir is vouched, and has no other assets except this rent, this is good assets, and shall be rendered in value; per Paston, which none denied; and yet it is agreed that he had no fee-simple in this rent. Br. Assets per Descent, pl. 17. cites 7 H. 6. 3. 4.

2. If a *reversion upon a lease for life, with rent reserved*, descends to the heir, it is good assets. Br. Assets per Descent, pl. 23. cites 16 E. 3. and Fitzh. Voucher, 85.

*As in seire facias*, the tenant pleaded confirmation with war-

3. In case of the descent of a *franktenement without profits*, or where the heir had the *profits without the franktenement*, quære, if in either of these cases it would have been assets to charge him at common law.

ranty and assets descended, the plaintiff said that his father was indebted to the K. and be seized for the debt, and the father died, and the King committed it to him till the debt be paid rendering such rent, which debt is not paid, absque hoc, that he had other assets. Quære, for the frank-tenements are agreed to be in the heir. Br. Assets per Descent, pl. 9. cites 43 E. 3. 9.

And it was said if land of 40s. per ann. descend charged with rent of 26s. per ann. this is not assets of 40s. nevertheless this seems to be where the charge is of an estate of franktenement, but here the charge is only a chattle, and the franktenement not charged, therefore quære. Br. Assets per Descent, pl. 9. cites 43 E. 3. 9.

So where the plaintiff said that assets descended to the heir in R. and that he had conveyed them away by fraud to toil him of his action, of which lands the heir took the profits; and the defendant said, that he made a *feoffment to J. N. in fee upon condition*, and as to the taking the profits no law will put him to answer, and it was not adjudged; nevertheless, it seems that it is not assets to charge him, for he had no franktenement in him of it. Br. Assets per Descent, pl. 10. cites 48 E. 3. 32.

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Kelw. 124. b. pl. 82. calius incerti temporis.

4. An annuity is no assets, for it is only a *chose en action*; quod nota bene. Br. Assets per Descent, pl. 26. cites Doct. & Stud. lib. 1. fol. 76.

5. If a manor descends to an infant, and after a *tenancy escheats*, such land escheated shall be assets by descent. Finch 17. b.

## (C) At what Time it shall be Assets by the having of it.

[1. *I* F he hath assets at the day of the writ purchased, or after, this shall be assets, and shall charge him. 42 E. 3. 10.]

\* For if he had assets, and aliened them before the writ of

[2. *But if* he had assets by descent, but not at the day of the writ purchased, nor after, this is not assets to charge him. \*42 E. 3. 10. b. 26 H. 8. 1. 48 E. 3. 32. b.]

debt brought, he is discharged; contra in formedon brought by himself after the assets aliened; for this is his own suit. Br. Assets per Descent, pl. 8. cites S. C.—Ibid. pl. 27. cites 13 E. 3. S. P. accordingly.

The reason why an heir was not chargeable for the debt of the ancestor after sale of the assets by descent was, because he was charged as tenant only. Poph. 155. Hill. 1 Car. in Case of Bowyer v. Rivet.

[3. If

[3. If the heir *aliens* the affets by *fraud* to oust the debtee of his action, and takes the profit to the value of the debt; this shall be affets. 48. E. 3. 32. b.]

Br. Affets per Descent, pl. 10. cites S. C. [which see at (B);

pl. 3.]—*Ibid.* pl. 27. cites 13 E. 3. and Fitzh. tit. Debt, 140. Note, that the heir shall not be charged if he has not affets the day of the writ purchased; and Brooke says, *Ideo vide* that if he has aliened the affets before the action of debt brought and retook, he is in of other estate, and shall not be charged.

4. Debt was brought against C. the heir of B. the heir of A. upon a bond of A. in which he bound his heirs. C. pleaded a false plea, and plaintiff had a verdict at law for recovery of his debt, but C. died before the day in Pank, having devised his lands to the defendant his son. The obligee by bill would charge the lands with this debt recovered at law, but rendered fruitless by the act of God, and the Case of PARKER v. DEE was cited as a precedent, but Ld. Chancellor dismissed the bill. Vern. 400. pl. 373. Pasch. 1686. Holley v. Weedon.

The devisee was likewise heir of the defendant at law against whom the verdict was given. 2 Chan. Cases 175. S. C. Ld. Jefferies said, that there was no

colour of equity in the cases unless you will have it that the defendant at law died maliciously before the day in Bank on purpose to defeat the plaintiff of his debt. Vern. 401. S. C.

5. The creditors by bond, by virtue of the statute 3 & 4 W. & M. cap. 14. shall not follow the estate in the hands of the alienee; for the person of the heir is the debtor, and not the lands, and consequently the lands in the hands of an alienee can be charged with nothing but what is an immediate lien thereon, which the bond is not; per Ld. Macclesfield. Ch. Prec. 512. pl. 316. Hill. 1718. in Case of Coleman v. Wince.

See tit. Heir (K. 2) pl. 19.

## (D) How the Judgment shall be against him.

[ 148 ]  
See tit. Heir (B) (B. 2) and (C).

[1. IN an annuity against an heir upon the grant of his father, if the defendant pleads that he has nothing by descent, and it is found that he hath some land in certain by descent, but \* not to the value, yet he shall be charged for the whole annuity. 5 R. 2. Annuity 21. adjudged for his falsity. 19 E. 3. Annuity 26. adjudged.]

\* See tit. Heir (C pl. 2. and the notes there, and *ibid.* pl. 8, 9.

[2. But otherwise if he had pleaded the certainty, how much he had by descent &c. 5 R. 2. Annuity 21. 19 E. 3. Annuity 26.]

## (E) Pleading of Affets by Descent.

1. IN debt against an heir upon the obligation of his father, the defendant ought to be named heir to the obligor. Br. Affets per Descent, pl. 10. cites 48 E. 3. 32.

2. Debt upon an obligation against an heir. The defendant pleads, that his father was seised of black acre, and made a lease for 99 years, and the reversion descended to him, and that he had *rius præter*. The plaintiff replies, that he hath affets descended in

3 Salk. 180. S. C. and per Cur. the præter is immaterial, because

the reversion which follows is not chargeable; for the ancestor had settled the lands upon trustees to the

use of himself for life, remainder to the heirs male of his body, remainder to his own right heirs, with power for the trustees to make leases, so that this was a lease made by them, and if the reversion should happen before the estate tail spent, he had still a reversion but after an estate tail. — 2 Mod. 50. S. C. and stated according to 2 Salk. the plaintiff replied protestando, that the settlement is fraudulent, & pro placito dicit that he has affets by descent sufficient to pay him; upon demurrer by defendant, the Court held the præter idle, and the general replication good; and judgment was given for the plaintiff.

*London.* The defendant demurs. Resolved, that the replication was naught, because he does *not answer the defendant's bar, nor traverse* when the defendant did offer him an issuable point; for he *should have said that he had affets besides the reversion; or else have prayed judgment*, and have had execution by a sci. fa. *when affets should descend.* Freem. Rep. 160. Pasch. 1674. Osberton v. Stanhop.

It is there said in marg. that he shall be charged as heir to the obligor, because the heirs in tail were never actually seised in fee; and judgment accordingly. — 3 Mod. 253. S. C.

adjudged by three justices, contra Eyre, for the plaintiff, that it was good without naming the intermediate remainder. — Show. 244. S. C. adjudged accordingly. — Carth. 126. S. C. adjudged accordingly. — 3 Salk. 178. S. C. — Freem. Rep. 498. pl. 672. Hill. 1690. B. R. Round and Kello, S. C. adjudged accordingly.

3. Where the father settled his lands to the use of himself for life, remainder to his eldest son in tail male, reversion to his own right heirs, and died, leaving issue 2 sons; the eldest, who was tenant in tail, entered, and had issue one son, and died, which son died without issue, so that the estate tail was spent, then the youngest son of the father entered; adjudged, that these lands shall be affets in his hands to answer the father's debts; and the sole question was, whether he should be charged as heir to his father, without naming the intermediate descent to his elder brother and nephew? 3 Lev. 286. Mich. 2 W. & M. in C. B. Kellow Rowden.

See (A) pl. 2. and the notes there.

4. A reversion expectant on an estate tail is not affets to charge the heir upon the general issue of *riens per descent*; agreed per tot. Cur. Carth. 126. Pasch. 2 W. & M. in B. R. in Case of Kellow v. Rowden.

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5. Motion in arrest of judgment, because upon the issue of *riens per descent* the jury had found that lands came by descent sufficient to answer the debt and damages, and had not set out the value of the lands descended under the statute of W. 3. The counsel for the plaintiff answered, that it was a replication at common law, and not under the statute, and a rule made nisi was discharged. Barnes's Notes in C. B. 325. Mich. 12 Geo. 2. Mathews v. Lee.

## (E) In what Cases Scire facias lies of Affets quando acciderint.

1. **I**N formedon, the defendant pleaded warranty of the ancestor with affets descended in fee, and the demandant was an infant, and the tenant was compelled to shew where the affets lay, and



and so he did, scil. at W. and no mischief per Finch. For in the resummons, if land descend after to the heir, the tenant shall allege it, and by him *if the demandant recovers and land descends after, the tenant shall have process to recover it*, and this by scire facias. Br. Assets per Descent, pl. 7. cites 40 E. 3. 39. and 11 E. 4. 21.

2. By Finch. 40 E. 3. *in formedon warranty is pleaded*, and the demandant recovers, and assets descend after, there the tenant shall have scire facias to re-have his land; for this record stands in force, because the demandant recovered. Br. Scire Facias, pl. 130.

3. But by 11 H. 4. 21. in formedon, the tenant shall have scire facias in this case, to *have over in value* as he shall have in voucher, where the vouchee has nothing at the time &c. but assets come after. Br. Scire Facias, pl. 130.

4. In replevin the case was, *tenant in tail of rent purchased the land in fee, and made feoffment with warranty and died; and assets descended, and the issue in tail made avowry for the rent, and the plaintiff pleaded in bar the feoffment with warranty, and the assets &c. and per Vavisor Justice, it is no plea; for the rent is not to be recovered in avowry, but only the defendant shall have return; and here if issue arises upon the assets, and it is found that he had nothing by descent, yet if land descends after, he shall not have scire facias to have that which is descended in value; for no rent was recovered against him, for the avowant is always supposed in possession.* Br. Scire Facias, pl. 142. cites 21 H. 7. 10.

5. But in *cui in vita* assise of mordancestor, formedon, &c. and assets is pleaded, and it is found that he had nothing, and assets is descended after, the tenant shall have scire facias against the heir; for he lost the land in the first action, and therefore it is reason that he should recover in value, quod nota good reason. Br. Scire Facias, pl. 142. cites 21 H. 7. 10.

6. In debt against the heir upon the bond of his ancestor, judgment was given for the plaintiff to have *a dry reversion, quando acciderit.* Roll. Rep. 57. pl. 34. Trin. 12 Jac. B. R. Anon.

For more of Assets in general, see Charge, Executor, Heir, Payment, Voucher (U. b. 3), and proper titles.

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Woy 52 S.P.  
Harvey v.  
Bateman.

Debts, tho'  
not assign-  
able in law,  
are on good  
considera-  
tion assignable in equity. Arg. 2 Chan. Cafes, 7. and ibid. 36 Trin. 32 Car. 2. decreed accord-  
ingly in the Case of Fashion v. Atwood.

By the law of merchants a merchant may assign debts. Arg. 2 Chan. Cafes, 37. admitted.

A debt on  
a judgment  
may be as-  
signed; but

whether a debt decreed in *Chancery* may, was not resolved. Arg. Litt. Rep. 116. cites Sir Miles Fieetwood's Case; but says, that this being a debt in conscience only, and not on a judgment in a Court, whereof the law in ordinary proceedings takes consueance, it was not transferrable.

use; for if so, the 27 H. 8. of transferring uses into possession, would be to no purpose; for this statute requires a seisin to the use; but there is only a possession in a lessee for years. Assignment of trusts begets strife and maintenance, and is void in law; by the judges of both benches. Jenk. 244. pl. 30.

9. A bond cannot be assigned to a subject, *unless for a debt due* by an assignor to assignee; for otherwise it is maintenance; per Cur. 3 Le. 234. Mich. 32 Eliz. in the Exchequer. South v. Marsh.

10. There cannot by law be any assignment made by any common person of his debt; per Cur. Cro. 180. pl. 18. Trin. 5 Jac. in Seacc. in Case of the King v. Twine.

11. A debt recovered in a court of record cannot be assigned over; per tot. Cur. Brownl. 33. Mich. 10 Jac. Anon.

12. Contingent benefits, which are annexed to an estate, and to an interest, may well be assigned over. Agreed per Cur. 3 Bulst. 254. Mich. 14 Jac. in Case of Haverhill v. Hare.

S. P. and  
that he may  
take it with-  
out deed in-  
rolled, it being only a Chattel. Br. Chose en Action, pl. 4. cites 21 H. 7. 19.

\* S. P. by Parker Ch. J. and the King or his grantee may sue for it in their own name, cites 21 H. 7. 19. and said that tho' generally the grantee sued in the King's name, that was only in order to take advantage of the prerogative. Wms.'s Rep. 251. Trin. 1714. in Case of Miles v. Williams.

13. A chose en action is \* assignable to the King. Arg. Sti. 21. Pasch. 23 Car. B. R. the King v. Holland.

N. Chan.  
Rep. 15.  
7 Car. 1.  
in totidem  
verbis.—  
2 Freem.  
Rep. 146.  
pl. 191.

7 Car. 1. S. C. and seems to be taken from one of the reports above mentioned.

14. Assignment of a decree is void in law, and being so ought not be mentioned against the rule of law in a court of equity, no consideration appearing to support the same, which should make it better in equity than at law. 3 Chan. Rep. 90. 17 Car. the Earl of Suffolk v. Greenville.

15. Lands were settled to raise money for daughters portions. One of them married J. S. and died before her portion paid. J. S. took administration to her, and assigned all his interest to W. his son by a former venter. J. S. died, and W. sued in equity for the money. It was insisted, that tho' choses en action might on a consideration be assigned here by the party that had the interest, and the assignee might recover them, and that the assignor's release afterwards, unless without notice, and on consideration paid to the releasee, would not hurt the assignee, yet the assignment being by an administrator, and not by him that had it in his

his own right, this had never been good; for there might be a creditor to satisfy the intestate &c. [or, a creditor of the intestate to satisfy &c.] Ld. Keeper thought there was a considerable difference between an assignment of the party and of the administrator, where the administrator was a stranger, and had no precedent right, and no colour of right, but merely by the administration; but that here the administration was pro forma only; for here J. S. had a right to the money, as a portion or provision for his wife, and every man has not ready money to give his daughters, but their portions are to be provided for by this means, and therefore it is reasonable to advance or promote the establishing of them, so as they may be disposable by the husband (who settles a jointure), as money itself may be; and so decreed for the plaintiff. Chan. Cases, 170. Trin. 22 Car. 2. Hurst v. Goddard.

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16. An *interest in a trust* is in equity assignable or devisable; per Wyld J. Chan. Cases, 211. Trin. 23 Car. 2. in Case of Cornbury v. Middleton.

Tenant for life with power to make a jointure of 500l.

per ann. in consideration of marriage and 10,000l. covenants to make such jointure, but dies without doing it. It was held that the articles are a lien on the estate, and that by the execution of them the covenantor became a trustee for the feme, and that such trust is devisable and assignable in equity. 9 Mod. 19. Lady Coventry v. Ld. Coventry.

17. Bonds are assignable *in Holland*, and therefore an assignment of bonds there, according to their custom, is allowable here; by the Ld. Keeper. Chan. Cases 232. Trin. 26 Car. 2. Ashcomb's Case.

18. One was to receive a proportion of damage from the town of Hamborough, and it was *stipulated that the town should pay so much to the parties that had suffered*; one whereof assigned his part or *proportion of the reparation* to another, notwithstanding which, he after received the money to his own use; whereupon the assignee brought covenant against him, and the words of the deed were only *assignavit & transposuit*; and tho' the thing in its nature was not assignable, yet it was enough to bind the assignor to suffer the assignee to enjoy it. 12 Mod. 554. per Cur. cites the Case of the King v. Farrington.

Mod. 113. pl. 12. Pasch. 26 Car. 2. B. R. the S. C.

19. A *bare power* is not assignable, but where it is coupled with an interest it may be assigned; agreed per Cur. As where a lease was made with power for lessor, his heirs and assigns, to cut down, grub up, and sell trees; and lessor granted some of the trees to J. S. who with his servants entered and cut them down; and it was objected, that this was a power annexed to the reversion only, and not assignable; and that he might have justified under the lessor, but not in his own right. But the Court held that an action doth lie in this case, both against the lessor and his assignee acting under his power, and agreed that here was an interest annexed to the power, for the lessor might sever the trees from the reversion; whereupon judgment was given for the defendant. 2 Mod. 317, 318. Trin. 30 Car. 2. B. R. Anon.

2 Jo. 205. Pasch. 34. Car. 2. B. R. Warren v. Afters, alias Arthur, S. C. and judgment against the plaintiff; but adds, Quære de hac materia. — [In the Case in 2 Jo. above, no mention]

mention is made of heirs or assigns, and it seems that assigns were not mentioned in the liberty reserved, because it was objected for the plaintiff that the liberty to fell &c.] was annexed to the reversion, and not granted to the defendant, who was vendee of the trees only; but non allocatur, for the liberty was annexed to the trees, and, as incident to them, assignable with them.

20. *Arrears of rent &c.* is a chose en action, and not assignable. See *Skin. 6. 26. Mich. and Hill. 34 & 35 Car. 2. B. R. Kingdom v. Jones.*

21. After an *ejectment brought by conusee of a statute*, and a liberate returned, the *lands are not assignable before entry*; by the opinion of Holt Ch. J. Dolbin and Eyre J. as it seems; and Holt said he had known this before Justice Ellis in the circuit, and held not assignable for want of an actual entry and possession. *Show. 290. Mich 3 W. & M. Hannam v. Stephens.*

22. It has often been doubted if a *lease for years before entry* and possession be assignable; per Dolben J. *Show. 291. Mich. 3 W. & M. in Case of Hanham v. Stephens.*

And where  
Brown  
granted over  
to J. S. and  
J. N. in  
such case  
J. S. and  
J. N. the

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2 assignees of  
the grantee  
cannot work  
severally in  
digging the

ore, but must work together with *one joint stock*, or such workmen as belonged to them both. *Godb. 17. pl. 24. Pasch. 25 Eliz. C. B. Ld. Mountjoy v. Ld. Huntingdon.*

23. The Lord Montjoy seised of the manor of Canford in fee did, by deed indented and inrolled, *bargain and sell* the same to Brown in fee, in which indenture this clause was contained, provided always, and the said Brown did *covenant, and grant to and with* the said Lord Mountjoy, his heirs and assigns, that the Lord Mountjoy, his heirs and assigns, *might dig for ore in the lands* (which were great waste) parcel of the said manor, *and to dig turf also for the making of alum.* Resolved, that notwithstanding this grant, Browne and his heirs and assigns might dig also; and like to the case of common sans nombre. *Co. Lit. 164. b.*

2 Freem.  
Rep. 250.  
pl. 318.  
Kimpland  
v. Courtney,  
Hill. 1700.  
S. C. on  
appeal be-  
fore the Ld.  
Keeper,  
who held  
the assign-  
ment good,  
and said  
this was a  
stronger  
Case than  
Lampett's;  
because the  
first devise  
being for a  
term of 50  
years only,  
the deviser  
had a re-  
mainder in  
him for the  
residue of  
the term;

24. *J. G. being possessed of a term of 2000 years, devised the estate to M. his wife for 50 years if she so long live, and from and after her decease to B. his son for 50 years, if he should so long live, and from and after his decease, to C. and D. his two grandchildren, for and during the residue and remainder of the said term.* C. assigns his interest in the life time of M. and B. and the question was, whether this was such an interest vested in the lifetime of M. and B. as was assignable in their life time; it was argued that it was a contingent interest, till after the decease of M. and B. and if so, altho' it be such an interest vested as cannot be defeated by the first devisees, and such as may be released in their life time, yet it cannot be assigned over; and seems to be the same case to this purpose, as *MATTHEW MANNING'S CASE* and *LAMPETT'S CASE*; on the other side it was insisted that here is but one part of the term carved out, viz. 50 years and 50 years, and the remainder of the term rested in the deviser, which he had power to devise as he thought fit, and the devisee might assign over; and in *Manning and Lampett's Cases*, the whole term was devised to the party for life, and was in him during his life, and nothing but a possibility in the executory devisee. And the Master of the Rolls was of that opinion, that this was an assignable

assignable interest, and that the moiety passed by the assignment, and decreed accordingly. 2 Freem. 238, 239. pl. 309. Trin. 1700. *Kingslader v. Courtney*. but in *Lampett's Case*, the devise being for life, the deviser had nothing but a mere possibility.

25. A man by his will gives a legacy of 300l. to a feme covert, without creating any separate trust of it, for her benefit, and this legacy was made payable out of a reversion of land expectant on an estate for life; the husband of the legatee, some time after, makes an assignment of this legacy to trustees in trust, and for the benefit of his children, and after by his will takes notice again of the same legacy, and devises it in like manner for the benefit of his children, and makes his wife, to whom the legacy was originally given, his executrix, and dies; the estate for life drops, and the widow applied to the executor of the first testator for the 300l. legacy. The Court decreed, that for as much as the husband who had a power to extinguish or release this legacy, had made a good assignment thereof in equity, and having again by his will confirmed that assignment, and given it again in the same manner, bound his wife the legatee. *Gilb. Equ. Rep.* 88. *Mich.* 1. *Atkins v. Dawberry*. Abr. Equ. 4c. cites *Mich.* 1714. S. C.

26. J. S. the *cestui que trust* of a term, upon his wife's joining in a sale of part of her jointure, by deed directs and appoints, that his trustees after his and his wife's decease, should assign the residue of the term to his wife's daughter (under whom the plaintiff claimed) when she shall attain the age of 21, or be married, after the decease of her father and mother. The daughter being married, she and her husband in the life time of her father and mother assigned the term to the plaintiff; the question was, if such a possibility could be assigned, and plaintiff well entitled in equity. *Ld. Keeper* said, *Equitas sequitur legem*, and that which is the rule of law, must be the rule here. It is a notion that has obtained at law, that a possibility is not assignable, but no reason for it, if *res integra*; but the law is not so unreasonable, but to allow that it may be released. The law holds it to be unreasonable that there should be an incumbrance on a man's estate, that can no way be discharged, and therefore doth allow that a possibility may be released; and dismissed the plaintiff's bill, but without costs. 2 *Vern.* 563, 564. pl. 511. *Mich.* 1706. *Thomas v. Freeman*. [ 155 ]

27. A *guardianship* is not assignable; per *Lord's Commissioners*. 2 *Wms.'s Rep.* 121. *Hill.* 1722. in *Case of Eyre v. Lady Shaftsbury*.

28. The late Duke of Hamilton being bound to pay Sir James Grey a sum of money in a year after his death, gave a note, by way of collateral security, that the money should be paid out of such arrears of rent as shall be due at his death; the benefit whereof plaintiff now prayed by her bill. But the Master of the Rolls said, this assignment or agreement is utterly void, for it cannot create any specific lien, because the thing itself (*viz.*) the arrears, was not then in being, nor is it to take effect till the death of the Duke;

Duke; and then it is too late, for the arrears then become part of his assets liable to his debts generally; and this differs from the case of *off-reckoning*, or of *pay due or to become due* &c. (which cases were objected) because in those cases the thing assigned is certain, and the assignee has a certain interest; but notwithstanding the assignment or agreement, he (the said Duke) had it still in his power to receive all the arrears, and so defeat his own assignment &c. wherefore &c. and he said that future contingent interests are no more assignable in equity than at law. MS. Rep. 546. Mich. 1730. Lady Gray v. Ducheſs of Hamilton.

29. 3000l. was to be raised by a trust term in a marriage settlement, for portions of daughters as should be living, and not advanced by the father at his death. There being several daughters, B. one of them, after she came of age, in the life time of her father, and whilst she was unmarried, releases all her share in the 3000l. to the owner of the inheritance. B. marries, the father dies, and bill is now brought by her as in her right to have her share &c. Defendant pleads the release in bar, and it was insisted for the defendant, that this share of B. tho' a possibility only at the time of the release, was assignable in equity, tho' not at law, and by the same reason might be released in equity, and that possibilities are assignable in equity, and cited HIGDEN AND WATKINSON, TIBBALS AND DUFAY, Cases in parliament, 16th March 1729. Lord Chancellor said that *choſes in action*, and *possibilities*, are assignable in equity, if made upon a consideration, but here no consideration appears; and at law a possibility may be released, but this is a demand in equity under a trust, and therefore shall be supported by a consideration; and ordered the plea to stand for an answer. MS. Rep. Hill. 1734. Robinson v. Bavaſor.

### (C) In what Cases it must be made on the Land.

1. IF a lessee be ousted of possession, he cannot assign his interest over, while the tortious occupier continues his possession, unless the deed of assignment be sealed and delivered upon the land. Dal. 81. pl. 20. 14 Eliz.

2. It was held upon evidence, that if the *lessee for years of the Queen* be ousted by a stranger, yet altho' he be out of possession, he may assign over his term; for the reversion being in the Queen, he cannot be out of possession, but at his pleasure. Cro. E. 275. pl. 5. Hill. 34 & 35 Eliz. C. B. Wingate v. Mark.

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### (D) Assignee. Who.

1. CONDITION in a lease was, that neither he nor his assigns should *alien without licence*. The lessee died intestate.

testate. The *administrator* was bound by this condition; cited per Walmsley J. to have been so adjudged. Cro. E. 757. pl. 24. Pasch. 42 Eliz. C. B. cites D. 152.

2. The law will never hunt for an assignee *in law* where there is an assignee *in deed*; per Coke Ch. J. 3 Bulst. 169. Pasch. 14 Jac. in Case of Allen v. Wedgewood.

3. Upon a *fine* the use of lands was limited to A. for 80 years, with a power to A. and his assigns to make leases for three lives, to commence after the determination of the said term. A. assigns over to B. B. dies, and makes C. his executor, who assigns over to D. who made the lease for life, which was the estate in question. And the question was, whether or no D. was such an assignee of A. as had power to make this lease? or whether it should extend only to the immediate assignees of A? And the doubt in this Case was the greater, because here was a descent upon an executor, who made the estate over to him, who makes the lease, and the Case in Hob. 11. PEASE v. STYLEMAN, was cited where an executor or an administrator in some cases shall not be said to be a special assignee; but all the Court seemed to incline to the contrary; and that D. shall be said an assignee well enough to this purpose, and so shall any person that comes to the estate under the first lessee, tho' there be 20 mesne assignments; and afterwards, in Mich. following, judgment was given accordingly. Freem. Rep. 476. pl. 654. Trin. 1679. How v. Whitebanck.

4. A *devisee* is an assignee *in law*; per Cur. 2 Show. 59. Pasch. 31 Car. 2. B. R. in Case of Whitfield v. How.

Vent. 340.  
How v.  
Whitfield,  
S. C. & S. P.

5. Where a *power* is coupled with an interest an assignee of an executor of an assignee may take as assignee. 2 Show. 57. pl. 43. Pasch. 31 Car. 2. B. R. Whitfield v. How.

Vent. 340.  
How v.  
Whitfield,  
S. C. & S. P.

6. Lease to A. and B. for 99 years, if &c. rendring a *beriet*. A. takes *husband* and dies; agreed per three justices that the husband is assignee within the word (assigns) in the lease. 2 Lutw. 1367. Trin. 2 Jac. 2. Osborn v. Sture.

7. A. covenants for himself, his executors, administrators and assigns, to permit and suffer a thing to be done; this cannot extend but only to assignees after the covenant entered into. 2 Vent. 278. Hill. 2 W. & M. in C. B. Target v. Loyd.

## (E) Assignee. What Actions and Advantages he may have.

1. **ASSIGNEE** of a reversion shall have writ of entry *in consimili casu* upon the alienation of the tenant for life, or *formadon in reverter* as the donor shall have after the tail determined. Br. Deputy, pl. 17. cites 7 E. 3. 54. and Fitzh. Brief, 947.

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2. The

[ 157 ] 2. The assignee of the *conuſor* after execution had upon *ſtatute merchant* ſhall have *ſcire facias* to re-haue the land. Br. Deputy, pl. 18. cites 32 E. 3. and Fitzh. Scire Facias, 101.

3. Assignee of an annuity granted in fee was admitted to maintain writ of annuity. Thel. Dig. 18. lib. 1. cap. 21. f. 1. cites Mich. 41 E. 3. 27. and ſays See 21 E. 4. 83.

4. And ibid. f. 2. ſays, ſo is the opinion of Hill. 9 H. 7. 16, where the prior of St. John's who had an annuity by reaſon of a commandry by preſcription, leaſed the ſaid commandry to one for years, and the leſſee had writ of annuity.

5. Where the leſſor for years ouſted his leſſee and infeoffed a ſtranger, and after the leſſee re-enters, there the feoffee ſhall not have action of debt for the rent arrear againſt the leſſee. Thel. Dig. 18. lib. 1. cap. 21. f. 5. cites Trin. 9 H. 6. 16. and ſays See 2 H. 6. 4. and Hill. 5 H. 5. 12. and adds Quære.

See Prerogative (M. b. 8.)—(M. b. 9.)

6. The King being as assignee in law ſhall have action of debt upon an obligation made to an outlaw. Thel. Dig. 19. lib. 1. cap. 21. f. 10. cites Mich. 19 H. 6. 47.

7. Thoſe to whom the King grants any ſum of money to be paid by teller, cuſtomer, or ſuch receivers and keepers of his money upon talley to them delivered ſhall have action of debt; and alſo thoſe to whom his Maſteſty grants a choſe en action upon liberate. Thel. Dig. 19. lib. 1. cap. 21. f. 11. cites Mich. 21 H. 6. Dett. 43. 27 [H.] 6. 9. Hill. 37 H. 6. 9. Hill. 37 H. 6. 17. 1 H. 7. 4. and 8. and 2 H. 7. 8.

8. The grantee of the King brought writ of *raviſhment of ward* where the *raviſhment* and *marriage* were before the grant; and ſo it is agreed by the Court, that the King may grant a choſe en action, and that the grantee upon this may maintain action. Thel. Dig. 19. lib. 1. cap. 21. f. 12. cites 5 E. 4. 8.

9. The King had granted to the Counteſs of Richmond his mother an advowſon and avoidance, when the church was void; and ſhe upon this grant for this preſentment brought *quare impedit*; and adjudged that the Counteſs ſhould have writ to the Biſhop. Thel. Dig. 19. lib. 1. cap. 21. f. 13. cites Paſch. 16 H. 7. 7. and ſays See 9 E. 3. 466. and 18 E. 3. 22. that ſuch grant of avoidance by the King is good.

2 Vern. 764. S. C.

10. A fraudulent bond, which is naught as to the obligee, will not be made good by assignment as to the assignee, but will remain liable to the ſame equity as before; and the assignee is to have all equitable advantages which the assignor could have had; per Parker C. 19 Mod. 450. Mich. 6 Geo. 1, in Canc. Turton v. Benſon.



(F) Take. In what Cases an Assignee may take a particular Estate, tho' there is no Word of Assigns in the Grant made to his Grantor.

1. A GRANT of the *next presentation* or vacation is good, and the grantee may grant it over, tho' no assignee be in the deed, where the grantor had fee in the patronage. Br. Grants, pl. 112. cites 7 H. 4. 2.

(G) The Difference between an Assignee and Deputy, both with respect to themselves and their Principals. [ 158 ]

1. THE Marshall of fee in B. R. may grant and assign it to J. B. for life, and a grantee or assignee is *seised to his own use*, and may have assise; but a deputy occupies to the use of the officer, and his forfeiture or misdemeanor shall make the officer lose the office; but misdemeanor of the grantee for life shall make nothing to be forfeited but his own estate for life, and not the inheritance of the grantor who has the reversion; quod nota. And there by all the justices, where the Duke of N. had granted the office to J. B. for life, and he is thereof seised, the Duke cannot grant to him to make a deputy. Brook says the reason seems to be, because by the first grant the grantee is officer for term of life; and therefore if it be not granted to him in the first patent to occupy and exercise by himself, or by his sufficient deputy, he cannot grant after to make a deputy; for it was admitted that the Duke himself might make a deputy before his grant, if he himself had exercised the office, and so it is done at this day. Br. Deputy, pl. 7. cites 39 H. 6. 35. S. P. Ibid. pl. 9. cites 11 H. 4. 1.

## (H) Pleadings.

1. IT was said that if a man pleads deed in bar as assignee, and the plaintiff says that he has nothing of the assignment &c. which is found against him, this is peremptory to the demandant; quod nota. Br. Peremptory, pl. 30. cites 20 Ass. 4.

2. In assise the tenant pleaded *seoffment with warranty made by the ancestor of the plaintiff to W. his heirs and assigns*, and the tenant is assignee of the assignee, and yet this is well pleaded; quod nota. Br. Deputy, pl. 5. cites 38 E. 3. 21.

3. *Auxury* by the Earl of Gloucester for fine for alienation made by one of his tenants. The plaintiff in the replevin pleaded deed that G. C. who was &c. was seised, and gave to R. and his heirs to hold by such services only, for all services and demands, *que estate*

he has; and it was awarded that the tenant may plead the deed well enough, as here by way of rebutter, tho' he be assignee, and no assignee is expressed in the deed; but he cannot vouch nor have contra formam feoffamenti &c. which sounds in action, where no assignee is in the deed. Br. Deputy, pl. 4. cites 14 H. 4. 5.

4. And hence it seems, that if assignee was in the deed, that the assignee shall have action which runs with the land, and the thing which is in lieu of action, as voucher; for land is a thing which may be assigned over. But quære of annuity; for this is a thing of such a nature that cannot be granted over. Br. Deputy, pl. 4. cites 14 H. 4. 5.

[ 159 ] 5. In entry in confirmili casu, lease was made for term of life, the remainder in tail to the father of the demandant. The tenant for life aliened in fee to the tenant, and the writ was that the tenant had not entry but by A. B. who held for term of life ex assignatione of the lessor, which cannot be assigned but by grant of the reversion; but where it is by remainder, as here, it shall be ex dimissione &c. and because not, therefore the writ was abated. Br. Brief, pl. 248. cites 38 H. 6. 30.

6. In debt for rent by assignee of reversion, he ought to be named assignee in the writ. In a nota of the reporter, and says that so are all the precedents. Lutw. 481. Trin. 3 Jac. 2. Nichols v. Tymms.

Skin. 303.  
pl. 7. S. C.

7. Where the party pleading derives an estate to himself, he must set forth all the mesne assignments of the lease for years (or grant for years by letters patents) in the pleadings: but where he derives an estate to his adversary, under which he does not claim any thing, in such case general pleading of per diversas medias assignationes devenit &c. is sufficient, because he has no means to know another man's title. Carth. 209. Hill. 3 W. & M. in B. R. Tucker v. Hodges.

8. In covenant against J. S. as assignee of W. R. the declaration only set forth that the tenements came to the defendant by assignments, virtute quarum &c. and therefore held ill; for it should have been set forth that the defendant was assignee of the term of J. S. for else it might be an assignment of another estate than this term of J. S. and the words (virtute quarum &c.) will not help it; for those are only by way of inference, and not traversable, and such a conclusion which is not warranted by the premises. Carth. 256. Mich. 4 W. & M. in B. R. Huckle v. Wye.

9. Assignment over of a lease may be pleaded without notice. See the Case of Tovey v. Pitcher, 4 W. & M. in B. R.

5 Mod. 133.  
S. C. and  
same diver-  
sity, per  
Cur.—  
1. Salk.  
139. pl. 4.  
S. C. and  
same diver-  
sity; and so  
a judgment in

10. There is a difference between doing a thing by a man and his assigns, and to them. If a thing be done by a man and his assigns, you must there allege in the disjunctive, that it was neither done by him nor his assigns; but if a thing be done to a man and his assigns, you need not mention his assigns; for if he has assigned it over, it must be shewed on the other side; per Cur. 12 Mod. 86. Mich. 7 W. 3. Smith v. Sharp.

C. B. was affirmed in B. R.

• 11. The ancient method of pleading assignments was *virtute cuius the assignee entered, and was possessed*; but that is disused now; for the assignee has the estate in him before entry, tho' not to bring trespass; per Holt Ch. J. *Ld. Raym. Rep. 367. Mich. 10 W. 3. in Case of Cook v. Harris.*

12. Tenant for years cannot assign over his *term* without writing, but the assignment may be pleaded without saying it was by deed; per Cur. 12 Mod. 540. Trin. 13 W. 3. Birch v. Bellamy.

For more of Assignment in general, see *Conditions, Covenants, Estate, Grants, Possibility, Rent, Warranty, Waste, and other proper Titles.*

**Affise.**

[ 160 ]

(A) Of what *Things* it lies.

Fol. 270.

An affise is not properly placitum but querela. Jenk. 31. pl. 61. S. P. for this is not granted but till the grantee

- [1. IT lies not of *homage*. 1 H. 4. 1. b.]
- [2. It lies not of an *annuity*. 1 H. 4. 2.]
- [3. It lies not of a *penſion* due out of an *abbey* or *priory*. 14. H. 6. 12.]

be promoted to a competent benefice, and this is of a penſion to which the King presented by reason that he is founder. Br. Affise, pl. 10. cites S. C.

- [4. But it lies of a *corody* due out of an *abbey* or *priory*. \* 14. H. 6. 12. Contra 17 E. 3. 27. b.]

Where a man is seized of parcel of a corody, and

*disseised of the rest*, he shall not have affise of the corody. Br. Affise, pl. 308. cites 30 Aff. 4.

\* Br. Affise, pl. 100. cites S. C.

Though the statute Westm. 2. cap. 25. f. 3. speaks of a corody, yet an affise shall be maintained of part of a corody. 2 Inst. 411. — 8 Rep. 46. a. such parts as belong to victuals and clothing.

- [5. An affise does not lie of a *way* over certain land, but a quod permittat, for it is but an easement. 34 Aff. 113. vel 13. adjudged.] [It seems that the (113. vel) should be left out.]

Br. Plaintiff, pl. 31. cites 34 Aff. 13. — Br. Affise, 338.

[337] cites S. C. — Br. Chimin, pl. 8. cites S. C. — Fitzh. Affise, pl. 317. cites S. C. — S. P. but quare if it had been a *way appendant*, for it seems to be in gross.

S. P. and so of a *passage ultra aquam*; for it is no franktenement nor profit appender. Br. Affise, pl. 442. cites 31 E. 1. and Fitzh. Affise, 440. — But otherwise of a *way appendant*, as appears elsewhere. Ibid. — S. P. 8 Rep. 46. b. accordingly, because there is nullum proficuum capiendum, as the statute mentions. — Affise lies for stopping a way which a man has to his house or land. F. N. B. 183. (N.) so that it ought to be a way appendant, for of a way in gross he shall only have action on his case. F. N. B. 183. (N) in the new notes there (a) cites 11 H. 4. 26. per Cur. And so of a way to a church, because he has no freehold in the church, cites 4 E. 3. Nuisance 8. but contra it seems as to a way to a church which one has ratione tenure. Quare if not an action on the case, or a writ of affise at his election. Ibid. — Jenk. 17. pl. 30. S. P. for a way ought to have

have a terminus a quo ad quem, and to be of some benefit to entitle a man to have an assise, and therefore if it be only in gross an assise lies not for the stopping it; for such grantee has no freehold.

6. Assise lies of *toll of a market*, and likewise of toll of a mill; but not of *suit to a mill*. 8 Rep. 46. b. cites 13 [30] E. 1. Assise 401. and 23 H. 3. fo. 435. tit. Assise 427. accordingly. And so of *toll-thorough*, *toll-travers*, and *toll-turn*, assise lies.

S. P. accordingly, by the opinion of the Court.

Br. Dower, pl. 92. cites 8 H. 6. 3.

— Assise lies of a *croft*, but a *formeden* does not; per Coke Ch. J. 2 Bullst. 214. Pasch. 12 Jac. in Case of Ellis v. Wallis.

Assise lies of a *croft*, because it is put in view to the recognitors; per Roll. Ch. J. Sty. 30 Trin. 23 Car.

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And this land shall be put in view. Br. Assise, pl. 151. cites

10 Aff. 4.

— But if a man grants an annuity, and after grants by another deed, that if it be arrears he may distrain in such lands, there he may distrain, and yet shall not have assise; for the annuity remains sicut prius; per Littleton. Br. Assise, pl. 489. cites 32 H. 6. 27.

S. P. by Berkley J. accordingly. Cro. C. 555. Trin. 15 Car. B. R. in pl. 10.

9. In assise, a plaintiff was made of 4 acres of *saucy*, and held good. Thel. Dig. 66. lib. 8. cap. 4. f. 1. cites 11 Aff. 13. Theloa! says, he thinks that it is *salicetum* in Latin, viz. a place where the willows grow, and cites 7 Aff. 18.

10. Thel. Dig. 66 lib. 8. cap. 4. f. 2. says, *quære of furze* but in diverse writs, and a *præcipe quod reddat* of so many acres of *turbary*, was held good, cites Pasch. 8 E. 3. 387. But says it was said there, that it should be demanded by name of a moor.

S. P. by Berkley J. Cro. C. 555. Trin. 15 Car. B. R. in pl. 10. says that assise lies de *bullaria salina* &c. Neither shall the feme have assise. Br. Assise, pl. 481. cites 14 E. 2. and Fitzh. Scire Facias 122.

11. In assise a plaintiff was made of *two parts of the boillowry of two leads of salt water* &c. in the county of Lancaster, which plaintiff was held not good. Thel. Dig. 66. lib. 8. cap. 3. f. 1. cites 9 Aff. 12. Mich. 9 E. 3. 466. But says, a *præcipe quod reddat* was brought of *two salt-pits*, Hill. 9 E. 3. 443. and that so is the common form and course at this day in the county palatine of Chester; as a salt-pit of so many leads without more.

12. A man shall not have assise of the *farm of a fair*, for it is *not in loco certo capiendo*, as in the statute, and yet the feme was therefore endowed. Br. Assise, pl. 471. cites 14 E. 3. and Fitzh. Scire Fac. 122.

\* Cro. C. 555. in pl. 1. S. C. cited, and S. P. admitted, by Crooke and Barkley J. as to a shop.

13. Plaintiff was made and admitted of *two shops* in assise. Thel. Dig. 66. lib. 8. cap. 3. f. 5. cites \*14 Aff. 11. and Pasch. 24 E. 3. 16. and 43 Aff. 2 Hill. \*48 E. 3. 4. and says, See in the register, fol. 2. a *præcipe quod reddat de duabus shopis*.

14. In assise the plaint was made of a cellar &c. Thel. Dig. 66. lib. 8. cap. 3. f. 4. cites Mich. 24 E. 3. 33.

S. P. admitted by Crooke & Barkley J. and cited S. C. Cro. C. 555. Trin 15 Car. B. R. in pl. 10.

15. Assise of 10l. rent issuing out of the hundred of B. The defendant said that there are several vills, viz. A. and B. in the hundred, which are not named in the writ; judgment of the writ, and if &c. Per Shard, a hundred is a thing not manurable, which cannot be put in view, and therefore the assise does not lie; for it is not a certain place. Br. Assise, pl. 309. cites 30 Aff. 5.

So where a man gives an advowson, or knight's fee rendering rent, assise does not lie of the rent; and also such

plea ought to be given by tenant, and not by disseisor; by which the assise was awarded. Ibid.

16. It is a good plea to the jurisdiction, that the land is his church-yard. Br. Jurisdiction, pl. 120. cites 44 E. 3.

17. In dower it was said by Babington, that præcipe quod reddat does not lie of a cottage; but plaint in assise of a cottage is good. Thel. Dig. 66. lib. 8. cap. 3. f. 2. cites Mich. 8 H. 6. 3.

S. P. as to Assise, per Cur. Br. Dower, pl. 92. cites 8 H. 6. 3.

18. Upon denying rent-charge or rent-sec, assise lies; but not of rent-service without rescous; and it was adjourned into the Exchequer-chamber for difficulty of the verdict. And if rent issues out of land guildable, and of land in ancient demesne, assise of the entire rent lies at common law. Br. Assise, pl. 69. cites 8 H. 6. 11.

19. If a man is seised of a ferry which extends into 2 counties, [ 16 ] and is disseised, he shall not have assise; per Portington. Br. Assise, pl. 76. cites 22 H. 6. 9. 10.

20. Needham J. said, that if one was disseised of the annuity which appertains to his office of justice, he shall have assise of his office, which was affirmed by all the justices except Yelverton. Quære, for it seems that a justice has no office but at will. Br. Assise, pl. 389. cites 5 E. 4. 10.

21. Rede said, that a man shall have præcipe quod reddat of a high chamber in a house. Thel. Dig. 66. lib. 8. cap. 3. f. 6. cites Mich. 5 H. 7. 9. But says it is reported there that the contrary is held 21 H. 6. because it is not franktenement; for it cannot have continuance perpetually, because if the foundation perishes the chamber is gone; and that so it is affirmed Pasch. 3 H. 6. Plaint. 1. where Babington said that a house is not franktenement, if it does not touch the land. And all the justices agreed, that such a house which is upon another house cannot be put in plaint nor in a writ; but an exchange was pleaded of land for a chamber. Thel. Dig. 66. lib. 8. cap. 3. f. 6. cites Mich. 9 E. 4. 40.

22. Plaint in assise lies of a garden or toft, but not præcipe quod reddat. Br. Plaint, pl. 22. cites 22 E. 4. 13. per Hufsey.

Br. Præcipe quod reddat, pl. 16. cites S. C. and

that by Hufsey Ch. J. that one shall not have a præcipe quod reddat of a garden only, but that he may have plaint in Assise of a garden, and of a toft.—S. P. by the opinion of the Court. Br. Dower, pl. 92. cites 8 H. 6. 3.

S. C. cited per Cur. 9. Rep. 112.b. — S. P. admitted per Cur. Cro. J. 257. Mich. 8 Jac. B.R. in pl. 15. — If the owner *snags up this wood*, so as there neither is nor will be any wood again, yet he shall have an affise from year to year of his common of estovers; per Hobart Ch. J. Hob. 43. obiter. — But per Cur. Yelv. 188. Mich. 8 Jac. B. R. the commoner shall have action on the *case* only, and not affise, because when all is destroyed he cannot be put in seisin, and cites Abridgment de Affise, fol. 21. — Brownl. 220. S. P. accordingly per Cur. but seem. only a translation of Yelv. — S. P. accordingly, 2 And. 7. pl. 5. — Br. Affise, pl. 491. (490) S. P.

24. An affise was brought of the *office of sadler to the Queen*, granted to the demandant by the King; but was held void by the whole Court, because the King could not make an officer to the Queen, and no place was mentioned where he should exercise and enjoy this office, and take the profits, and therefore the jury could not have the view, and so affise cannot be taken. So if the King grant the office of *usher to the Prince of Wales*, an affise will not lie. 1 Brownl. 28. Pasch. 6 Jac. Anon.

An affise was brought of the office of *clock-keeper to the Prince*, by grant of the King, during his own life, with a salary &c. but the patent purported the grant only without words of creation, as *constituimus officium* &c. nor could the plaintiff prove that it was an ancient office, and therefore nonsuited, though the tenant had made default before. Brownl. 328. Pasch. 8 Jac. C. B. *Cæsar v. Bull.* — Brownl. 28. Anon. but S. C. says the plaintiff shewed a grant of the same office in E. 6. time; but that was held no ancient time.

D. 83. &c. pl. 77. &c. Pasch. 7 E. 6. The Dean and Chapter of Bristol v. Clarke.

25. Affise cannot be brought of *rent issuing out of a bare rent of tithes only*, tho' it may be de portione decimarum, as is clear by Ld. Dyer, 7 E. 6. and the difference rightly stated; per Vaughan Ch. J. Vaugh. 204. Hill. 19 & 20 Car. 2.

## [ 163 ] (A. 2) By the Statute of Westminster 2.

At common law there were but 2 forms of writs of affise of novel disseisin in the register of the Chancery, that is to say, an affise *de libero tenemento*, and an affise *de communia pasturæ* for his cattle &c. which was so necessary as without it his freehold could not be manured; and the affise *de libero tenemento* did lie of houses, land, rent, and other things which lay in reuder, whereof a præcipe did lie at the common law; but if all profits appender, which consisted in capiendo, colligendo, habendo, recipiendo, & exercendo, an affise of novel disseisin did not lie at the common law; but the party was driven to his *quod permittat*, in which was great delay, and they which had but an estate for life could not maintain that writ, therefore this act doth give in all the said cases a speedy remedy by an affise in lieu of the *quod permittat*, so the said profits were to be taken or had in certo loco. 2 Inst. 411.

The defendant shall not be *assigned*, nor cast a *protection*, nor pray in *aid* but of the King, nor *vouch* a stranger, nor any party to the writ, unless he enters into warranty immediately, and the same of *recesses*; nor shall the *parol demur* either for the nonage of plaintiff or the tenant, and for divers other causes. 2 Inst. 411.

*Par. 3. And granteth that for estovers of wood, profit to be taken in woods by gathering of acorns &c. for a corody, for delivery of corn, and other victuals and necessaries to be received yearly \* in a place certain toll, tronage, passage, pontage, pawnage, and such like, to be taken in places certain, keeping of parks, woods, forests, chaces, warrens, gates, and other bailiwicks and offices in fee, from henceforth an assise of novel disseisin shall lie;*

\* The words (in a place certain) extend to estovers, and all the profits appender, and not to the clause of

the office be removeable, yet it must be in certo loco, when the assise is brought. 2 Inst. 412.

In assise of the office of Clerk of the Crown in Chancery, it was alleged that assise does not lie but in loco certo capiende, and the Chancery is removeable, and not certain, therefore no assise; & non allocatur. Br. Assise, pl. 95. cites 9 E. 4. 6.

Assise does not lie of an office, unless it be of an estate of fee, as it seems by the statute of Westminster. 2. cap. 25. Br. Assise, pl. 13. cites 15 H. 6. 6. & 7.

Tho' the statute mentions only (offices in fee) yet it being herein made in affirmance of the common law, such as have offices in tail or for life shall have assise. 2 Inst. 412. — 8 Rep. 47. a. b. S. P. accordingly, and enumerates several offices for life for which an assise lies; as of the office of Mower, 30 Ass. pl. 4. So of the office of packing clothes &c. 22 H. 6. 9. b. So of the office of Sheriff granted for life. So of the office of one of the Clerks of the Crown in Chancery, 9 E. 4. 6. a. b. So of the office of Beadle of the Honour of Westminster and Middlesex, 18 E. 2. tit. Assise, 377. So of Porter of the Court of the Archbishop of Canterbury for life, 4 E. 4. 44. tit. Assise, and ibid. 8 E. 2. 335. So of an office in the Common Pleas, 8 E. 4. 10. b. As of the office of Filacer, 28 H. 8. Dyer 7. So of the office of Register of the Admiralty, 5 Mar. Dyer 153. So of the office of Steward or Baili, or Receiver of a Manor, 21 H. 8. tit. Grants, Br. 134.

Assise was brought of the office of the Keeper of the Forest of B. and assise of Mortdancer of the Bailiwick of the Forest of P. Br. Assise, pl. 122. cites Trin. 2 E. 3. in B. R. — And assise was brought of the office of Usher of the Exchequer. Ibid. cites 8 E. 3. 7.

And tho' the words are general, yet this act is to be intended of offices of profit only, and not of offices of charge and no profit; but it extends as well to offices in the Admiralty Court, Ecclesiastical Court, or any other court, what either the civil or ecclesiastical law, or any other law than the common law &c. of England doth rule, as to offices in temporal courts which are governed by the common law &c. as by the authorities above said, and Jehu Webb's Case appeareth. 2 Inst. 412. — 2 Inst. 47. b. 49. b. S. P. accordingly.

If a man be disseised of the whole office, he shall have an assise de officio cum pertinen.; and albeit the statute speaketh de officiis, yet if he be disseised of parcel of the profits, he may have an assise of that parcel; but therein also are diversities, as you may read in Jehu Webb's Case. 2 Inst. 412. § Rep. 49. b. S. P. accordingly.

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*Par. 4. And in all the cases afore rehearsed, according to the accustomed manner, the writ shall be de libero tenemento.*

If a man takes my nets and fish in my piscary,

I shall have assise de libero tenemento, and the plaint shall be de piscaria. Br. Assise, pl. 441: cites 2; H. 3. and Fitzh. Assise, pl. 433.

Writ of assise of common shall be of common of pasture, and not de libero tenemento; and if it be otherwise the writ shall abate; per Paston. Quod non negatur. Quere inde. Br. Assise, pl. 437: cites 11 H. 6. 22.

*Par. 5. And as before times it hath lain and holden place in common of pasture, so shall it from henceforth hold place in common of turf, land, fishing, and such like commons which any man hath appendant to freehold, or without freehold by special deed, at the least for term of life.*

*Par. 6. In case also when any holdeth for term of years, or in ward, alieneth the same in fee, and by such alienation the freehold is transferred to the feoffee, the remedy shall be by a writ of novel disseisin, and as well the feoffor as the feoffee shall be had for disseisors, so that during the life of any of them, the said writ shall hold place.*

This is an affirmance of the common law; for the freehold being in the lessor or in the heir

heir, the livery being made by the lessee for years, or guardian, doth work a disseisin, because by this sortious livery he disseiseth the lessor, for which they may have an assise of novel disseisin at the common law, and both the feoffor for making, and the feoffee for taking a tortious livery were both disseisors; and so it is if tenant at will or tenant at sufferance make a lease for years, and the lessee enter; this is a disseisin to the lessor at the common law. 2 Inst. 412, 413.

This act speaks first of a tenant for years, and yet a tenant by *elegit statute merchant*, or the *statutes*, are within this law; and so it is of a tenant at will, or a tenant at sufferance, for all these have a possession, but otherwise it is of a *bailliff*, for he hath no possession at all. 2dly, Of guardian, which extended not only to *guardian in chivalry*, but to guardian in *socage*, & *par cause de nurture*. 3dly, Of an alienation in fee, and yet an *alienation in tail or for life*, is within this act, because they are within the same mischief. 4thly, If tenant for years, or a guardian make a lease for life, the remainder for life, the remainder in fee, and tenant for life enters, he is a disseisor, because he taketh the first livery; and so it is of him in the remainder for life, or in fee, if he enter. 2 Inst. 413. S. P. as to tenant by *elegit*, his executor, or assignee, by the equity of the statute. Dr. Parliament, pl. 104. cites 22 Aff. 45.

*Par. 7. And if by the death of the parties, remedy happen to fail by that writ, then remedy shall be obtained by a writ of entry.*

*Par. 8. And albeit, that above mention is made of some cases, wherein a writ of novel disseisin held no place before, let no man think therefore that this writ lieth not now where it hath lien before.*

These words are to be intended, when one claims common in the

*Par. 9. And tho' some have doubted whether a remedy be had by this writ, in case where one feedeth in the several of another, let it be had for certain, that a good and a sure remedy is given in that case by the said writ.*

several lands of another, and puts in his cattle to use the same; the owner of the soil hath two ways to help himself, either to waive the possession, and then to bring his assise as one out of possession, as in the common case of a disseisin, and then he shall have judgment to recover the land and damages; or else he may keep his possession, and bring his general writ of assise of novel disseisin, and if the tenant pleads to the assise, that the plaintiff was tenant of land the day of the writ purchased, and yet is, the plaintiff may maintain his writ, and say that the land was, and is, his several, and the defendant did feed his several with his cattle, and according to this branch of this act he prayeth the assise; and in this case if it be found for the plaintiff, he shall have judgment to hold the land as his several, and damages. 2 Inst. 413.

A feme covert and an infant are not within this statute, to have corporal punishment by imprisonment by their plea by vouching

*Par. 10. And let them which be named disseisors beware from henceforth, that they allege not false exceptions, whereby the taking of the assise may be deferred, saying that another time an assise of the same land passed between the same parties, or saying, and falsely, that a writ of more high nature hangeth between the parties for the same land; and upon these and like matters do vouch rolls or records to warranty, to the end that by the same vouching they may take away the vesture, and receive the rents and other profits, to the great damage of the plaintiff.*

[ 165 ] of a record, and failing of it. 2 Inst. 414.

*Par. 11. And where before none other pain was limited against him that had falsely alleged such untrue exceptions, but only that after such false surmises disproved, the assise should pass.*

This act does not extend to an assise of Mortdancer. Ibid.

*Par. 12. It was ordained that if any, being named disseisor, do personally allege the exception at the day to him given (if he fail of the warranty that he hath vouched) he shall be adjudged for a disseisor, without taking of the assise, and shall restore the damages before enquired of, or to be enquired after, to the double, and shall nevertheless have a year's imprisonment for his falsehood.*

In a formodon or

any other real action, if the tenant plead a record, and fail thereof at the day, the demandant shall not have seisin of the land, but only a petit cape; for this statute extendeth only to the assise of novel disseisin; and in case of the assise, if the tenant before this statute had pleaded a record, and failed thereof, yet the assise should have been taken, as appeareth by this act. 2 Inst. 414.



Baron and feme pleaded a record in bar of assise, which was denied, and they were adjourned, and at the day the baron made default, and the feme was received notwithstanding this statute, and so she is not accounted a disseisor, because that seems to be the act of the baron. Br. Assise, pl. 136. cites 13 Ass. 1. — Br. Coverture, pl. 35. cites S. C. — S. P. and S. C. cited Pl. C. 105. a b. — S. P. for judgment cannot be given upon this default, by reason that the feme is received. Br. Parliament, pl. 173. cites 11 H. 4. 51.

In assise against an infant, he pleaded a record and failed at the day, yet he may plead another matter, and shall not be a disseisor notwithstanding the statute. Br. Assise, pl. 467. cites 36 E. 2. and 33 E. 3.

— Br. Coverture, pl. 76. cites S. C. — S. P. & S. C. cited by Saunders, Pl. C. 364. a. — Br. Coverture, pl. 44. cites 4 H. 7. 11. S. P. by Hawes.

In assise, if the defendant pleads that, not attached by 15 days which is found against him by examination of the bailiff, this is not peremptory. Br. Peremptory, pl. 66. cites 6 R. 2. and Fitzh. Assise 462. and 22 Ass. 19. accordingly. — It is no plea in assise in B. R. Br. Assise, pl. 95. cites 9 E. 4. 5.

Contra, if it be found against him by the assise. Ibid.

But it is not usual to try it by assise at this day, but to make the tenant answer over, if the bailiff be not present to be examined. Ibid.

Par. 13. And if that exception be alleged by a bailiff, the taking of the assise shall not be delayed therefore, nor the judgment upon the restitution of the lands and damages.

In an assise the bailiff cannot plead any matter of record,

either in bar or to the writ; for the bailiff cannot plead any matter, or any plea out of the point of the assise, nor any thing that is not triable by the assise, nor any plea which he cannot conclude, Et si trove ne soit, nul tort, nul disseisin; and if therefore the bailiff do plead any matter of record, yet the justices shall proceed &c. and give judgment; but then the defendant named in the assise may come unto the justices, and verify that there was such a matter of record &c. and he shall have a certificate of assise by force of this act. 2 Inst. 414.

Par. 14. Yet nevertheless, that if the master of such a bailiff that was absent, come after before the justices that took the assise, and offer to prove by record or rolls, that at another time an assise passed between the same parties of the same land, or that the plaintiff at another time did withdraw his suit in a like writ, or that a plea hangeth by a writ of a more high nature; a writ of venire facias shall be granted unto them, to cause the same record to be brought, and when he hath the same, and the justices do perceive that the record so shewed by him, would have been so valuable before the judgment, that the plaintiff by force of the same should have been barred of his action; the justices shall presently cause the party to be warned that first recovered, that he appear at a certain day, at the which the defendant shall have again his seisin and damages (if he before paid any by the first judgment given) which shall be restored to him to the double, as before is said.

Par. 15. And also he that first recovered shall be punished by imprisonment, according to the direction of the justices.

Par. 16. In the same manner, if the defendant, against whom the assise passed in his absence, shew any deeds or releases, upon the making whereof the jury were not examined, nor could be examined, because there was no mention made of them in pleading, and by probability might be ignorant of the making of those writings; the justices upon the sight of those writings, shall cause the party to be warned that recovered, that he appear at a certain day, and shall cause the jurors of the same assise to come.

This branch not only extends to an assise of novel disseisin, but to the assise of dar-

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rein presentment, and some have thought, to an attainder; so as

Par. 17. And if he shall verify those writings to be true, by the verdict of the jurors, or by inrollment, he that purchased the assise contrary to his own deed, shall be punished by the pain aforesaid.

Par.

the tenant shall not only have a certificate of an assise by the former branch upon matter of record, but also by this branch upon deed, and quiet claims, and the reason whereof is, for that the bailiff could not plead the same. And it is to be observed, that after the bailiff hath pleaded to the assise, the tenant may come before the assise taken, tho' it be after the assise awarded, and plead any deed, quiet claim, or other matter of certificate, and shall not be driven after the assise taken &c. to sue his certificate upon this act, to trouble the tenant and the recognitors of the assise; quia frustra fit per plura, quod fieri potest per pauciora. 2 Inst. 414.

\* Upon this branch it hath been conceived, that tho' some of the former recognitors be dead, it shall be tried by the former, and others; for tho' this act doth ordain, that a venire shall be awarded to the jurors of the same assise, yet the subsequent words be, Et si per veredictum juratorum, and saith not predictorum; and so as upon this act an addition may be made. 2 Inst. 415.

In an assise the plaintiff made title to 10 marks rent by specialty of the grant of the tenant, and the assise was taken by default, and after the tenant upon shewing of a deed of defeasance of the same rent, upon certain conditions to be performed on the plaintiff's part, or otherwise the rent to cease, which he averred to be broken, which deed of defeasance did bear date in a foreign county, viz. in London; whereupon a certificate upon this statute was prayed before the justices of assise, who adjourned the same in Bank to be resolved, whether a certificate did lie upon this foreign defeasance; where it was awarded, that the certificate was maintainable, and that the deed of defeasance being denied, should be tried in London, where it was found for the tenant; whereupon the certificate was remanded to be taken in the county where the assise was brought. Out of this record three things are to be observed. 1st, That a certificate doth lie upon a defeasance bearing date in a foreign county (as well as upon a charter of acquittance) which was tried by jurors of that foreign county, and by none of the recognitors of the assise. 2dly, That a certificate lieth by this act, upon a recovery by default, as well as where the tenant pleadeth by bailiff to the assise. 3dly, That the certificate must be sued and adjudged in the county where the assise was sued. 2 Inst. 415, 416.

This ox which the sheriff took was not any

*Par. 18. And the sheriff from henceforth shall not take an ox of the disseisee, but of the disseisor only.*

reward for doing his office, for that was prohibited by the statute of W. 1. cap. 26. but this was a duty due by ancient custom after the cause ended, but where it was due only from the disseisor, the sheriff before this act did also encroach the like upon the disseisee, which is restrained by this act, and to be taken only of the wrong doer, and neither of the disseisee, nor of the tenant that is no disseisor. 2 Inst. 416.

This branch is in affirmation of the law, for seeing they are joined in one writ, they are as to this purpose but as one disseisor, and therefore but one ox is due unto the sheriff. 2 Inst. 416.

\* *And if there be many disseisors named in one writ, yet shall be contented with one ox; nor shall receive any ox but of 5s. price, or the value.*

But on a new assise brought by the plaintiff, he gave in evidence, that one ox

## (B) Of what Seisin for an Office.

[1. **T**HE taking of 3d. of A. for a capias against B. is a sufficient seisin of the office of *Filizer*, de Banco. D. 2, 3. Ma. 114. 63.]

Wentl. 70. pl. 89. S.C. and the pleadings.

2. In assise of the office of *Register of the Admiralty* the demandant laid a prescription to it, viz. Quod quælibet hujusmodi persona, which should be named by the admiral, should be Register of the Admiralty for life. D. 149. a. pl. 81. and 152. b. 153. a. pl. 9. &c. Mich. 4 & 5 P. & M. Hunt v. Elifson and Allen.

But on a new assise brought by the plaintiff, he gave in evidence, that one ox

3. In assise of the office of *Serjeant at Mace to the House of Commons*, the defendant being put to prove seisin proved only that he went to the House of Commons, and demanded his place, but never received any fees; but that in an action on the case

case brought by him for disturbing him he recovered 300l. damages. Some of the judges thought this a sufficient seisin, the damages being recovered in satisfaction of fees, he being kept out of the possession of his office; but others held e contra, and this was intended to be found specially, but the demandant chose rather to be nonsuit. 2 Lev. 108. Trin. 26 Car. 2 B. R. Cragg v. Norfolk.

gave him 20s. and this (notwithstanding that the defendant was in possession long before and after) was held a good seisin; for the plaintiff cannot be disseised of the office but at his election. And it was also proved in evidence, that the plaintiff being in the Lobby of the House of Commons, near the door of the House, laid his hands upon the mace, then being in the hands of the defendant, and would have taken it, but the defendant hindered him, and this was held good evidence of seisin and disseisin, and the recognitors gave their verdict for the demandant. 2 Lev. 120. Hill. 25 & 26 Car. 2 B. R. Cragg v. Norfolk. — Mod. 122, 123. pl. 28. Anon. but S. C. it was objected, that the plaintiff was never invested into the office. But Hale Ch. J. said, that an investiture does not make an officer when he is created by patent, as in this case, but he is an officer presently; but if he was created Herald at Arms (as in Segar's Case) he must be invested before he can be an officer; and a person is an officer before he is sworn.

4. A man cannot have an affise upon a *bare election* and constitution as a recorder, but where it is by *patent or grant*; per Holt. Cumb. 244. Pasch. 6 W. & M. in B. R. in Case of the King v. Dean &c. of Westminster.

in *BLAGRAVE'S CASE*, and several other cases, and the constituting another under the common seal is a removal. Vent. 342. Trin. 31 Car. 2. B. R. Pepis's Case.

### (C) *Abridgment in an Affise.*

[1. **T**HE demandant in an affise may abridge his plaint *at any time after the jury are charged*, and after they are in the hostel, in communication of the matter, and *before verdict*. 33 H. 6. 18. b. adjudged.]

It, and after took the verdict of the rest, and took day by adjournment for their judgment at Westminster, and then the next term they gave judgment for the plaintiff of the rest by advice of the other justices. — Jenk. 111. pl. 15. S. P. as to abridging the plaint; but says, that after verdict given and entered the plaint cannot be abridged.

The plaintiff can *not* abridge his plaint *after verdict*. Br. Abridgment, pl. 15. cites H. 25 E. 3. — Kelw. 116. b. pl. 56. says, Nota it was said, that a man may abridge his plaint whenever he will before judgment, but says, Vide the contrary by Vavifor. 6 H. 7. 38. [but misprinted, there not being so many folios.]

No abridgment can be of a plaint after judgment. 2 Brownl. 237. By Williams J. — After appearance of the jury, and before verdict, the plaint was abridged. D. 132. a. pl. 76. Mich. 2 & 3 P. & M. Grensfeld v. Strech.

2. In affise, at the first day the plaint was made of an office and of a corody, and at the 2d day of the corody only, and admitted. Thel. Dig. 76. lib. 8. cap. 28. f. 1: cites Mich. 18 E. 2. Affise 377.

3. In affise, if dower be brought in one vill, and the demand is of a manor which extends into this vill, and into another vill, there by abridgment of the demand all may be made good, as appears P. 13 E. 3. in Dower, and so see that the exception upon the abridgment shall

ing committed by the [ 167 ] House of Commons to the defendant compounded with the plaintiff for the fees, and

Where a recorder is at will, they may remove him at pleasure, as it is common seal

Br. Abridgment, pl. 3. cites S. C. and the justices of affise suffered

But in other cases than dower he cannot abridge his plaint as to

the demand shall extend to another vill than is named in the writ. Br. Abridgment, pl. 13. cites 7 Aff. 20.

entirely, because the assise is sworn the first day, and the jury is made up of all the vills comprised in the writ; but in dower the jury is not sworn the first day. Fitzh. Plaint, pl. 7. cites Trin. 36 H. 6. —Thel. Dig. 76. lib. 8. cap. 28. f. 27. cites S. C.

[ 168 ] Note, that a man may abridge his demand *in dower after the view*, but shall not change his demand after the view. Br. Abridgment, pl. 19. cites 7 E. 3. and Fitzh. Dower 100.

Fitzh. Brief 699. S. C. is, that the writ should abate, because the plaintiff was of hay to be taken in a different vill from Pontfret, and not so named in the writ &c. and therefore he was nonsuited; but Fitzherbert says, he thinks that he could not abridge his plaint, because it is all one franktenement by specialty.

4. In assise de libero tenemento in Pontfret, the plaint was of a *house*, and of a *corody*, viz. of *so many loaves &c. and of three loads of hay in B.* It was held, that the writ should abate by the not naming of B. without abridging his plaint of the hay. Thel. Dig. 76. lib. 8. cap. 28. f. 3. cites 10 Aff. 26. Mich. 10 E. 3. 53. Brief 699.

Br. Abridgment, pl. 20. cites S. C. and Fitzh. Plaint 9. and Abridgment 11. —Thel. Dig. 76. lib. 8. cap. 28. f. 5. cites S. C. and 14 E. 3. Plaint 9.

5. In assise the plaint was of *land and rent*, the defendant pleaded in bar of the rent; the plaintiff may abridge his plaint of all the rent; quod nota bene by award; coram Shard. Br. Abridgment, pl. 14. cites 14 Aff. 9.

6. Assise of land in 2 wapentakes, and the panel returned all of one, and none of the other, by which the array was challenged and found, and therefore it was quashed. And after the plaintiff would have abridged his plaint of land in the one out of which no juror was returned, and was not received because of the challenge of the party. Br. Abridgment, pl. 15. cites 28 Aff. 38. —Brooke makes a quære, for it was contra in C. B. Hill. 25 E. 3.

Thel. Dig. 76. lib. 8. cap. 28. f. 3. cites S. C. and tho' he pleaded that the moiety was severed by metes and bounds &c. yet he could not abridge his plaint for this moiety. —\* Assise of a manor, the tenant pleaded in bar to parcel, and other matter to the rest, and the plaintiff said, that the parcel in the bar is the 3d part of the manor, and abridged his plaint of it, and was suffered, for it was not pleaded to the 3d part of the manor, but to other quantity, as acres &c. Br. Abridgment, pl. 29. cites 40 Aff. 4. —Thel. Dig. 76. lib. 8. cap. 28. f. 12. cites S. C. —Kelw. 116. b. pl. 56.

7. Assise of common of pasture of 40 acres, the defendant said, that the moiety of the land in which &c. is seized into the hands of the King, and so found by examination of the escheator, by which the plaintiff would have abridged his plaint of it &c. and was not suffered, the reason seems to be, because the common is \*entire; contrarium now by the stat. 21 H. 8. 3. Br. Abridgment, pl. 16. cites 29 Aff. 10.

8. Assise of common, the plaintiff made plaint, and before challenge he amended it, the tenant said, that he shall not be received; but per Grene, he may abridge his plaint and enlarge it before challenge, by which the tenant pleaded over in bar. Br. Assise, pl. 331. cites 32 Aff. 5.

9. In assise, tenant for life of two parts of certain land, the 3d to him in the reversion of the two parts, the tenant for life charged the two parts with rent of 10s. and he in the reversion of two parts, who had also the 3d part in demesne, confirmed this grant, and by a clause of *præterea* granted other rent of 10s. out of his 3d part, and the grantee brought assise of the rents, and the tenant pleaded jointenancy of the 3d part with a stranger, by which the plaintiff abridged his plaint of this rent issuing out of this, and well; quod nota. Br. Abridgment, pl. 31. cites 45 Ass. 13.

10. In assise of rent and two robes, the plaintiff abridged his plaint of parcel of the rent, and of the robes. Thel. Dig. 76. lib. 8. cap. 28. f. 11. cites 45 Ass. 13.

11. In assise, the tenant pleaded jointenancy for part, and another bar for the rest, and as to that which the tenant pleaded jointenancy, the plaintiff abridged his plaint, and admitted good; quod nota. Br. Abridgment, pl. 5. cites 2 H. 4. 20.

13. In assise the plaint was of the moiety &c. and as to parcel a recovery was pleaded in bar, and another bar for the residue. The plaintiff abridged his plaint of all that to which the recovery was pleaded &c. Thel. Dig. 76. lib. 8. cap. 28. f. 13. cites Mich. 13 H. 4. 10. 2 H. 4. 20.

[ 169 ]  
If demandant makes his plaint of a moiety of 10 acres of land, then he may abridge the

moiety of 5 acres, because the acres of which he hath made his plaint of a moiety, are several, and not entire. Kelw. 116. b. pl. 56. S. C.

But it was said that if a man makes his plaint of 10 acres, and the tenant pleads in bar, and severs the acres by moieties, the demandant cannot abridge his plaint in the moiety of any of the acres, because he made no such plaint by the name of a moiety, but his plaint was by name of acres, and therefore he cannot abridge his plaint in the moiety, but in the acre he may. Kelw. 116. b. pl. 56.

14. In assise the tenant pleaded a bar to the moiety, and another plea to the other moiety, and the plaintiff made several titles, and were adjourned upon one title; and at the day of adjournment, after argument, the plaintiff abridged his plaint of it. Quod nota. Br. Abridgment, pl. 21. cites 10 H. 6. 22.

15. In assise one bar was pleaded as to one moiety, and another bar for the other moiety &c. and the plaintiff was received to abridge his plaint for the one moiety. Thel. Dig. 76. lib. 8. cap. 28 f. 16. cites 13 H. 6. title 21. Mich. 10 H. 6. 23.

16. If a man makes his plaint of a manor, he cannot abridge it; for a manor is entire, and if he should abridge 5 acres thereof, then he has no such a manor of which he hath made his plaint. Kelw. 116. b. pl. 56. *Casus incerti temporis*.

17. 21 H. 8. cap. 3. enacts, That the plaintiff in assise may abridge his plaint of any part whereunto a bar is pleaded, in such manner as he or they might do in case the pleas in bar had been made and divided to any certainty or number of acres in the plaint; and that the plaint, for the residue of the part or parts of the lands not abridged, shall stand good.

In assise if the defendant pleads to the moieties, the plaintiff may abridge his plaint by the statute

of 21 H. 8. cap. 3. But abridgment in dower, nor in any other action, but in assise only, is not remedied by this statute. Quod nota. Br. Abridgment, pl. 2. per Brooke.

18. In affise the plaint was of 53s. rent, and afterwards 20s. thereof was abridged. After judgment this was assigned for error among others; and it was admitted per Cur. to be error, because the rent is a thing entire, and cannot be abridged as land and such things may. D. 65. a. b. pl. 5. Mich. 3 E. 6. Arundel (Earl) v. Windsor (Lord).

(D) Of what Possession an Affise lies. [*And of the Ouster of what Tenant.*]

\* Br. Colour, pl. 47. cites S. C. — Fitzh. [1. \* 2 E. d. 4. 5. b. e Concess. to Litt. if the guardian be ousted, the heir may have an affise, and with this agrees Co. 6. Brediman 57. b.]

20. cites S. C. — Kelw. 110. a. in pl. 31. Casus incerti temporis, S. P. For he cannot come to have possession in demesne without doing prejudice to the guardian. — 2 Inst. 134. cites S. C.

[ 170 ] [2. 1 H. 7. 18. b. per Keble, the King seized of a ward by office, of this possession the heir may have an action. 45 E. 3. 26. 3 H. 6. 33. b. 21 Ed. 3. 34. 9 Ed. 4. 33. per Genny, and Co. 6. Brediman 57. b. \* Lessee for years is ousted, the lessor may have an affise.]

\* Br. Colour, pl. 47. cites S. C. and the Court held that it was good colour. — Fitzh. Colour, pl. 27. cites S. C. & S. P. accordingly. [3. \* 2 Ed. 4. 5. b. per Litt. [if] the lessor dies, and after the lessor for years is ousted, the heir of the lessor shall have an affise of novel disseisin, and not a mortdancestor. † 22 Ed. 4. 14. ‡ 45 Ed. 3. 26. 22 Aff. 24.]

† Br. Trespass, pl. 365. cites 22 E. 4. 13. S. P. accordingly by Fairfax. ‡ S. P. For the profits taken by the termor is seisin of the heir. Br. Affise, pl. 31. cites 45 E. 2. 25. — Fitzh. Affise, pl. 61, cites S. C. — Kelw. 110. a. in pl. 31. Casus incerti temporis, S. P. accordingly; for he cannot come to the possession in demesne without doing a prejudice to the termor. †

\* Br. Receipt, pl. 1. cites S. C. & S. P. by Fitzherbert, that the recoveror shall have affise. [4. \* 27 H. 8. 7. a reversion of a lease for years is recovered, and before execution (for the execution shall cease during the term) the lessee is ousted, the recoveree [recoveror] shall have an affise. But quære this; for Co. 1. Shelly 106. b. by all the justices, of tenant in tail in reversion upon a lease for years suffers a common recovery, the reversion is not in the recoverors by the judgment.]

[ 271. ] [5. 9 H. 7. 24. per Curiam, if ceste que vie dies, or a lease for years is determined, the lessor or his heir shall not have an affise against the occupiers of the land, without an entry in fact, after the determination of the term.]

[6. Tenant at will grants the possession to another, who enters, the lessor may have an affise. 22 E. 4. 6.]

[7. If tenant by elegit or statute merchant be ousted, he in the reversion may have an affise. 3 H. 6. 33. b.]

[8. [So] If tenant at will be ousted, the lessor may have an affise. 21 Ed. 3. 34.]

Br. Trespass, pl. 365. cites [9. The heir cannot have an affise against an abator; for he had not possession. 22 Ed. 4. 14.]

22 E. 4. 13. S. C. & S. P. accordingly by Fairfax.—Kelw. 109. b. 110. a. S. P. accordingly, because he might have entered, and have had possession without doing wrong to any, but did not, and it was his own act and folly.

[10. If *lessee for years* be ousted, the lessor may have an assise. D. 354. b. pl. 35. Pasch. 19. Elis. S. P. 21 E. 3. 34.]

accordingly. Cromwell (Ld.) v. Andrews.—S. P. accordingly in a nota of the reporter, 9 Rep. 105. b.—See pl. 2. S. P.

If a man leases for years, the remainder over in fee, and after the *tenant for years* was ousted of his term, it was held that he in the remainder may have an assise, because the freehold was in him at the time of the disseisin, and he cannot come to the possession during the term; for then he should prejudice the tenant for years. Kelw. 109, b. pl. 31. Casus incerti temporis.

[11. If *tenant for years of a common* be ousted, the lessor may have an assise. 21 Ed. 3. 34. \* 22 Aff. 84. † 45 Ed. 3. 26.] \* Br. Seign, pl. 36. cites S. C.—Fitzh. Aff.

Assise, pl. 228. cites S. C.—† Br. Assise, pl. 31. cites S. C.—Fitzh. Assise, pl. 61. cites S. C.

[12. The same law, if *lessee at will* of a common be ousted, the lessor may have an assise. 21 E. 3. 34.]

13. Note that if a *prior* be *seised of a rent*, and *dies*, and his *successor distrains*, and *rescous is made*, he shall have assise of the seisin of his predecessor, tho' he himself was not seised, because he found his church seised, and he has nothing but in right of his church. Quod nota. Br. Assise, pl. 109. cites 3 Aff. 5.

And so it is of an abbot and other religious regular persons; for they are dead persons in law, and have capacity to have lands and goods only for the use and benefit of the house, and cannot make any testament, and therefore the church or religious house is holden always one [and the same], in respect whereof the succeeding abbot shall have an assise for a disseisin done in the life of the predecessor, and an action of waste for waste done in his predecessor's time; but [ 171 ] so shall not a bishop, archdeacon, dean, parson, or the like, that are ecclesiastical seculars, because the church by their death hath an alteration, and is not always one, and they may make their testament; for that they may have goods and chattels to their own use. 2 Inst. 151.

sons in law, and have capacity to have lands and goods only for the use and benefit of the house, and cannot make any testament, and therefore the church or religious house is holden always one [and the same], in respect whereof the succeeding abbot shall have an assise for a disseisin done in the life of the predecessor, and an action of waste for waste done in his predecessor's time; but [ 171 ] so shall not a bishop, archdeacon, dean, parson, or the like, that are ecclesiastical seculars, because the church by their death hath an alteration, and is not always one, and they may make their testament; for that they may have goods and chattels to their own use. 2 Inst. 151.

14. And where a *feme* is *seised of rent*, and *takes baron who distrains*, and *rescous is made*, they shall have assise. Quod nota. Ibid.

15. Executor of *tenant by elegit* brought assise of the land delivered by elegit, and made *general plaint*, and well. Brooke says the reason appears, as it seems to him, tit. Title, inasmuch as it is of land of which assise lies at common law, tho' those tenants cannot have assise at common law, but by statute. Br. Plaint, pl. 15. cites 22 Aff. 45.

It seems that none shall have assise by the common law, but he who has title of franktenement; but by statute, tenant by statute Merchant and elegit may have assise. Br. Darrein Presentment, pl. 2. cites 5 H. 7. 16.

ment; but by statute, tenant by statute Merchant and elegit may have assise. Br. Darrein Presentment, pl. 2. cites 5 H. 7. 16.

16. If a man recovers land erroneously, and has execution, and after *infeoffs A.* and the tenant who lost brings writ of error against him who recovered, and *scire facias* against him, and *reverses the first judgment* and enters, A. shall have assise; quod nota; because *scire facias* ought to have issued against A. The reason seems to be, because he might have a release to plead, or such like. Br. Assise, pl. 283. cites 28 Aff. 21.

17. If a man recovers in assise of rent or common &c. and the sheriff puts him in possession, and after at another time he is disturbed to take the rent or common, he shall have assise or redisseisin upon the first putting in seisin; for the law adjudges him in possession by the first seisin; per Thorpe. Quod non negatur; but quære. Br. Assise, pl. 31. cites 45 E. 3. 25.

D. 209. a.  
pl. 20. Mich.  
3 & 4 Eliz.  
Coveney's  
Case seems  
to be the  
case intend-  
ed.—The  
head of a

18. If a master of an hospital is deprived of his office by a lay-patron without cause, he may have an assise, because he hath no other remedy; but if such a master is ecclesiastical, and deprived by the ordinary without cause, he shall not have an assise, because he may appeal to the visitor. 11 Rep. 99. b. in James Bagge's Case.

college, cannot maintain an assise for his headship; for he hath no sole seisin, the whole body of the college having an interest therein; per Holt Ch. J. Skin. 488. Trin. 6 W. & M. in B. R. in Case of Phillips and Bury.—Show. Parl. Cases 47. S. C. & S. P. accordingly, Arg.

See tit.  
Parceners,  
(P).

(E) Of what Possession an Assise lies. And what not. [Joint Possession or Estate.]

S. P. and  
because the  
brought the  
assise as feme  
sole, and the  
defendant  
pleaded to it  
as to a feme  
sole, there-  
fore it shall  
not be ar-  
gued whe-  
ther the

[1. IF baron and feme purchase lands in fee jointly, and after the baron is attainted of felony, upon which the King seizes the land, and after the lord of whom the land is holden comes into Chancery, and upon his suggestion has it delivered to him as his escheat. Because the feme had a joint estate with her baron, and the lands were delivered out of the hands of the King by a false suggestion, this is a disseisin to the feme, and she may have an assise. (It is intended that the baron was dead before the delivery out of the hands of the King.) 4 Ass. 4. adjudged.]

baron be alive or not. And Brooke says, that therefore it seems that the King granted it for the [ 172 ] year, day, and waite only, and then the entry of the lord by the livery obtained by the false suggestion made the disseisin, and that it was no disseisin during the King's possession. Br. Assise, pl. 114. [113] cites S. C.—Fitzh. Assise, pl. 166. cites 4 E. 3. 47. S. P. and is the S. C. only fuller than in the book of assises, and is at 4 E. 3. 46. b. 47. a. pl. 34.

(E. 2) In what Cases it lies.

1. A FEME endowed of the 3d part of a mill, if the heir takes the entire toll, she shall have assise; for they are not tenants in common; for the feme shall have every third toll-dish by itself. Br. Assise, pl. 440. cites 23 H. 3.

2. If land be recovered in a bafe court, which does not lie within the jurisdiction, he may have assise; but if he brings writ of false judgment thereof, he shall not have assise; for this affirms that it lies within the jurisdiction. Br. Assise, pl. 159. cites 10 Ass. 25.

3. If a man charges land with rent in divers counties, he may distrain, but assise does not lie; for by writ in one county he cannot recover franktenement in another county. Br. Assise, pl. 218. cites 18 Ass. 1.

4. If



4. If there is no tenant or disseisor named in the assise, the writ does not lie. Br. Brief, pl. 279. [283] cites 22 Ass. 8.

5. *A. and B. are condemned in damages, and an elegit issues of their lands, and the sheriff put the land of A. in execution by the elegit, by name of the land of B. Quære therefore if A. shall have assise thercof; for it is doubted.* Br. Assise, pl. 328. cites 31 Ass. 28.

6. *A man shall have assise upon a claim without entry where he dares not enter.* Br. Assise, pl. 350. cites 38 Ass. 23.

If a man delivers to me a deed of feoffment,

and shews me the land a great way off, and I agree thereto and accept the deed, and dare not enter for fear of death, this is a good possession to have an assise; Quære inde. Br. Assise, pl. 350. cites S. C.

7. *If a man recovers by verdict, and before judgment the tenant seizes a lease of the plaintiff, he cannot plead it, but if he be ousted he shall have assise, per Tank, to which it was not answered.* Br. Assise, pl. 366. cites 43 Ass. 19.

So if the demandant in præcipe quod reddat releases his right mesne

between the nisi prius and the day in Bank, and recovers and enters, the tenant who lost shall have assise by the release. Br. Assise, pl. 378. cites 5 H. 7. 40.—S. P. Ibid. pl. 424. cites M. 6 R. 2. and Fitzh. Assise 70. per tot. Cur.—S. P. Ibid. pl. 492.

8. *Dum suit infra ætatem, per Belk. if a man be sole seised of an acre of land in D. and jointly seised of another acre there with his feme, and præcipe is brought against him [the baron] of one acre, there if the demandant recovers, and enters into the acre of which the feme is jointenant, the baron and feme shall have assise; for the recovery shall be intended of the acre of which he was sole seised, because the feme is not named.* Quære. Br. Assise, pl. 37. cites \* 48 E. 6. 31.

\* This should be 48 E. 3. 31.

9. *Where a man by colour of one kind of office ousts another who has another kind of office, he shall have assise, and not scire facias, unless they are all one and the same office, and not divers.* Br. Assise, pl. 390. cites 6 E. 4. 2.

10. *In an assise of novel disseisin the demandant counted, that the tenant did disseise him de uno muro lapideo, and had built an house in the place thereof to his nuisance. The Court said, that he ought to have brought an assise of nuisance, and so a judgment was reversed.* Sty. 195. Hill. 1649. Colson v. Ree.

(E. 3) In what Cases it lies. Against whom. And [ 173 1  
who shall be said Disseisor.

1. **A**SSISE does not lie of the ward of the great part of the mansion of the palace of the Bishop of Canterbury against the disturber alone, without naming the Bishop who is tenant of the franktenement, no more than the assise of a rent charge against pernor without the tertenant; quod nota. Br. Assise, pl. 444. cites 4 E. 2. and Fitzh. Assise 449.

2. *If my tenant attorns to a stranger without authority, I shall have assise against both.* Br. Assise, 466. cites 3 E. 3.

O 2

3. Assise

3. Assise against A. and B. the assise said that B. disseised the plaintiff and infeoffed A. and that A. did not disseise the plaintiff, and therefore the plaintiff recovered, and was amerced against A. for the false plaint, and yet he could not do otherwise but bring the assise against disseisor and tenant; quod nota. Br. Assise, pl. 123. cites 7 Ass. 14.

4. W. recovered against one who had nothing, and infeoffed B. and one C. delivered seisin to B. and the very tenant brought assise against B. and C. and omitted W. and yet well, for B. who delivered seisin is disseisor. Br. Assise, pl. 157. cites 10 Ass. 22.

5. A man leased land for life, rendering rent, and went beyond sea, the tenant for life died, and T. N. counselled H. W. the heir of the lessor to enter, who entered and infeoffed P. and the lessor came and would have entered, and P. disturbed him, and he brought assise against P. and the counsellor omitting him who entered, and the plaintiff recovered, for the counsellor is disseisor, and so sufficient if disseisor be named in the writ; quod nota; Br. Assise, pl. 193. cites 14 Ass. 12.

6. Assise, lord and tenant, the lord grants the rents and services to J. N. in fee upon condition of payment, and non-payment ex parte the grantor [viz. by way of mortgage] and he tendered [the money] at the day &c. The grantee refused, and after the tertenant [who had attorned to the grantee] paid the grantee, and the grantor distrained, and rescous was made, and the grantor brought assise against the tertenant; and the opinion of the Court was, that the grantee is tenant of the rent, and therefore the plaintiff was nonsuited; quod nota; for the assise ought to have been brought against the grantee. Br. Assise, pl. 209. (199.) cites 15 Ass. 12.

7. If a man levies my rent of my tenants by coercion, assise lies against him only, but where the tenants pay him of their own will, the assise shall be against him and the tenants. Br. Assise, pl. 207. cites 16 Ass. 15.

8. Assise of rent service may be brought against the mesne who is pernour and tenant of the rent, and against the disseisor who makes rescous without naming the tertenants. Br. Assise, pl. 330. cites 31 Ass. 31.

9. But it was said, that in assise of rent-charge or rent-seck all the tertenants ought to be named, but in assise of rent-service, if he has tenant of the rent and disseisor it suffices without the tertenants; and in assise of rent seck all the tertenants shall be named in pain of abating the writ in toto, notwithstanding that it was once a rent-service. Ibid. cites 31 Ass. 31. and 32 Ass. 10.

Br. Joine-  
nancy, pl.  
62. cites  
S. C. —

Br. Non-  
tenure, pl.  
30. cites  
8 Ass. 35.  
S. P. —

In assise for  
a rent-  
charge of  
50l. a year  
the title was,

that J. V. and A. his wife were seised of two manors, and by fine conveyed the same (inter alia) to one W. by the name of two manors &c. who by the same fine rendered the same rent of 50l. to them and to the heirs of A. and also rendered the said two manors to them for their lives, the remainder to F. their son in tail, remainder to the heirs of A. — J. V. and A. died, the rent descended to the plaintiff as son and heir of A. and F. entered as in his remainder, and thereof infeoffed G. who was the tenant in the assise, and on nul disseisin &c. the plaintiff had judgment in the assise, upon which a writ of error was brought, and assigned that the fine was of two manors (inter alia) which words import, that other lands besides the manors did pass; if so, the assise brought against him that was only tenant of the manors is not good, because all the tenants of the lands comprised in the

the fine ought to be named, and Gawdy and Clench held it to be error; & adjournatur; and afterwards was discontinued by the death of the defendant. Cro. E. 226. pl. 11. Pasch. 3; Ellis. B. R. Garbons v. Weston.

10. A vicar shall have affise against the parson. Thel. Dig. 47. lib. 5. cap. 9. f. 2. cites Trin. 40 E. 3. 28.

11. By a disseisin made to the use of an infant, he is not disseisor nor tenant without actual entry. Br. Affise, pl. 46. cites 3 H. 4. 16.

12. If guardian aliens the land of the infant, affise lies. Br. Affise, pl. 491. cites Natura Brevium.

13. A disseisor made a lease for years, and being about to leave the realm, he ordered the lessee to keep the possession against the disseisee till he returned, and that if the disseisee should enter upon him, that lessee should re-oust him, which he did, and paid the rent to the use of the disseisor; Saunders Ch. J. held, that without express agreement after the disseisin, the franktenement is not vested in cesty que use; but the others held e contra, and thereupon the plaintiff was nonsuited. D. 141. pl. 47. Pasch. 3 & 4 P. & M. Cutts v. West.

14. If two coparceners commit a nuisance, and one of them dies, the affise or quod permittat must be brought against the surviving aunt, and the heir of the other. 12 Mod. 637. H ll. 13 W. 3. cites Case of Roswell v. Prior. 2 Inst. 406.

15. A quod permittat must be brought against the alienee, because in its nature it must be brought against him that is tenant of the freehold; per Cur. 12 Mod. 639. In Case of Roswell v. Prior.

16. So an affise of nuisance must be against the alienor and alienee; but if the alienee dies, the party must have a writ of entry in the per, and not an affise; per Cur. 12 Mod. 639. In Case of Roswell v. Prior.

17. A monk may be a disseisor, as appears by many authorities, and particularly by this, viz. That a writ of affise lies against him, the judgment in which writ is, quod recuperet seisinam, which supposes a monk to have a freehold. 10 Mod. 125. Arg. in Case of Thornby v. Fleetwood.

(E. 4) In what Cases Affise lies not, but other Action, as Scire Facias, Error, &c.

1. A MAN recovered by judgment against E. who died pending the writ, his heir entered, and he who recovered ousted him; the heir shall not have affise, but writ of error, for the judgment is not void, but error. Br. Affise, pl. 282. cites 28 Aff. 17.

2. Scire Facias by the Earl of S. against M. where he was restored by act of parliament to the land forfeited by his father, and was seised till ousted by office, which found for the King, and the land is now come to the seisin of M. and because it ap-

peared that he himself *was seised after the act*, and so the *act executed*, therefore his writ was abated, and he put to the assise, or to the other remedy, quod nota. Br. Scire Facias, pl. 64. cites 7 H. 4. 6. and 8 H. 4. 14.

[ 175 ] 3. Where the King has a manor in ward, which is known by the name of the manor of B. and of the manor of S, if he grants the custody of the manor of B. to one, and after grants the custody of the manor of S. to another, and he ousts the first grantee, and he brings scire facias to repeal the patent, he ought to surmise that the manors of S. B. are all one &c. so that it may appear, that the patents are of one and the same thing; for if they are of diverse things, assise lies, and not scire facias. Br. Patents, pl. 63. cites 8 E. 4. 6.

\* Pl. 1, 2,  
3. 8.  
† Pl. 4, 5,  
6, 7, 9, 10.  
‡ Pl. 11,  
12, 13.

(F) In what Cases it shall be awarded at large.  
[Upon \* Demurrer.] [+ In Respect of Damages.] Not ‡ of the Seisin nor Disseisin.

The assise shall be awarded of the damages, and not upon the seisin and disseisin.

[1. IF the tenant pleads in bar, and after demurs upon another thing out of the point of the assise, and after this it is adjudged for the demandant, the assise shall not be awarded at large, but the demandant shall have judgment presently. 17 Ed. 3. 42. b. for the land 17 Ass. 2.]

Br. Assise, pl. 208. (207) cites S. C. — S. C. cited by Montague Ch. J. and judgment given accordingly. Cro. J. 468. pl. 13. Hill. 15 Jac. B. R. in Case of Holdford v. Platt, which see as to this point at (O) pl. 9.

S. C. & S. P. cited accordingly by Montague Ch. J. Hill. 15 Jac. B. R. Cro. J. 468 in pl. 13. and judgment

[2. As in assise, if the tenant pleads the release of the demandant, and the demandant says, that it was upon condition, and shews how he hath performed it, upon which the tenant demurs, and this is adjudged for the demandant; he shall have judgment presently without awarding the assise at large, because the demurrer is upon a matter out of the point of the assise. 17 Ed. 3. 42. b. Adjudged 17 Ass. 2.]

there given accordingly. — S. C. cited 2 Roll. Rep. 22. in S. C. — See (O) pl. 9. — Br. Assise, pl. 208. (207) cites S. C.

Br. Estoppel, pl. 138. cites 30 Ass. pl. 46. et. S. C. & S. P. but because the tenant

[3. In an assise if the tenant makes title as heir to J. S. and pleads an estoppel upon record against the plaintiff, to estop him to claim as heir to J. S. upon which the plaintiff demurs, and this is adjudged no estoppel; the assise shall not be awarded at large. 30 Ass. 61. admitted.]

was an infant, and therefore Thorpe ex assensu sociorum awarded the assise at large; and Brooke says, Sic vide, that if the tenant had not been an infant, the demurrer had been peremptory against him, and the demandant had recovered upon the demurrer. — Br. Mortdancestor, pl. 56. cites 30 Ass. pl. 46. S. P.

[4. In an assise, if the tenant pleads as daughter and heir to J. S. and that the plaintiff is a bastard, and so not heir, upon which they

they are at issue, and he is *certified a mulier*; the affise shall not be awarded at large, but only in right of the *damages*. 43 Aff. 11. 43. adjudged.]

[5. In an affise, if the *tenant says that the plaintiff is a nun professed*, and it is *certified by the ordinary that she is no nun*, the affise shall be awarded at large, and not only in right of the *damages*, although the plea was tried against him. 21 Ed. 3. 38. b. 59. b. \* 21 Aff. pl. 20. adjudged; but *quære*. 1 Ed. 3. 9. b.]

\* Br. Receipt, pl. 94. cites S. C.

[6. In an affise, if the *tenant pleads in bar an extent*, and the *plaintiff avoids it, because the conusor was tenant in tail of whom he is the issue, and so he entered after his death*, upon which the *tenant demurs*, whether the \* *plaintiff can avoid the extent made upon his father by entry, without an audita querela*, and this is *adjudged against the tenant*, the affise shall not be awarded at large, but only in the right of the *damages*. Dubitatur 38 Aff. 5.]

Fol. 272.

\* In the original it is [ 176 ] (tenant), and therefore misprinted.

[7. In an affise, if the *tenant says that the plaintiff acknowledged a statute to J. who thereupon extended this land que estate he has*, and the *plaintiff says that he himself was seised till disseised by the tenant, absque hoc* that the tenant has the estate of J. upon which the *tenant demurs*, and this is *adjudged against him*, the affise shall not be awarded at large, but only in the right of *damages*; for the possession is acknowledged without title. Contra \* 30 Aff. 43. adjudged.]

\* Br. Affise, pl. 315. (314) cites S. C. that the tenant demurred, because the plaintiff had not denied the statute, and that the

monies are not yet levied, and thereupon the affise was awarded against him.

[8. In a *mortdancestor as heir to J. if the tenant says that H. was seised in fee, and devised to J. in tail, and that if he died without issue his executor might sell, and that after the death of J. without issue the executor sold to him*; to which the *demandant says that J. was seised in fee, absque hoc* that he had any thing by the *devise*; upon which the parties demur whether this be a good replication, *without shewing how he came to the fee*, and this is *adjudged for the demandant*, the affise shall be awarded at large; for *no fee is acknowledged in J.* Contra 25 Aff. 1.]

[9. If in an affise the *tenant pleads a recovery against the plaintiff in another affise by default*, and the *plaintiff says* that he was then *within age*, upon which the *defendant demurs*, and it is *adjudged against him*, yet the affise shall not be awarded in right of the *damages*, but at large, because the tenant has *not acknowledged any ouster*. 26 Aff. 6.]

Fitzh. Affise, pl. 235. cites S. C.

[10. In an affise, if the *tenant pleads a plea in bar, and acknowledges an ouster*, and the *plaintiff makes title*, upon which the parties *demur*, and this is *adjudged against the tenant*, the affise shall not be awarded at large, but in right of the *damages*, because he has acknowledged an ouster by his plea. 28 Aff. 21. adjudged.]

Br. Affise, pl. 283. (282) cites S. C.

Fitz. Affise, pl. 268. cites S. C.

[11. In an affise, if the *tenant pleads an ill bar, and acknowledges an ouster*, and the *plaintiff makes title to himself*, and this is *found against the defendant*, it shall not be enquired of the *seisin*

Br. Affise, pl. 379. (378) cites S. C.

Fitzh. Assise, pl. 36. cites S. C. *and disseisin*, as well as [as it should be] if he had pleaded a good bar. 6 H. 7. 2.]

Br. Assise, pl. 379. (378) cites S. C. — [12. So if the tenant says, let the assise come upon the title, and this is found against the defendant, there shall be no enquiry of the seisin and disseisin. 6 H. 7. 2.]

Fitzh. Assise, pl. 36. cites S. C. — If the tenant pleads a bar at large, and the plaintiff makes his title at large, and the tenant says *veniat assisa*, in this case the jury shall not intermeddle with any other title, nor shall the plaintiff take advantage of any other. Kelw. 170. b. pl. 3. Mich. 6 H. 8. per Pigot, says it was ruled so in assise brought at Warwick.

Fitzh. Assise, pl. 36. cites S. C. & S. P. accordingly. — Where [13. So in an assise, if the tenant pleads an ill bar, the plaintiff is not bound to answer it, but may make a title at large, and pray the assise. If the title be found, it shall not be enquired of the seisin and disseisin. 6 H. 7. 2.]

the bar is insufficient it has not the force of the title, whether it be good or ill; for if the seisin and disseisin be found, the plaintiff shall have advantage of what else is found, and therefore it is policy and necessary for the tenant to make a good bar, and then if the title be not good the plaintiff shall not have judgment to recover, notwithstanding the seisin and disseisin be found; and therefore in the principal case the bar being ill, the assise found another title for the plaintiff, and found the seisin and disseisin; per Pigot, said to have been so ruled at Warwick. Kelw. 170. b. pl. 3. Mich. 6 H. 8. Anon.

14. In assise the tenant pleaded a foreign release, upon which they are adjourned, and at the day the tenant made default. The assise shall be taken at large; for by the default the plea is waved. But per Shard, if they had appeared, and the release had been found against the defendant, if the plaintiff will release his damages he shall recover immediately; for the assise is to enquire of the damages only; for the release confesses the disseisin, so that the seisin and disseisin shall not be enquired. Quod nota diversity. Br. Assise, pl. 417. [416] cites 22 E. 3. 4. and Fitzh. Assise, 125.

15. In assise the tenant pleaded in bar, and the plaintiff made title, and the defendant did not answer to the title. The assise shall be awarded at large by some, and by some in right of the damages, therefore quære. Br. Assise, pl. 30. cites 45 E. 3. 24.

\* See (F) pl. 4. 5. 6. 7. 9. 10.

(G) In what Cases it shall be taken at large. [Or only in Right of \* Damages.]

Br. Mortdancestor, pl. 46. cites S. C. — Fitzh. Mortdancestor, pl. 32. cites S. C. and 40 E. 3. 48. — See (I) pl. 1. S. C.

[1. If in a mortdancestor the tenant pleads a plea in bar of the action, and this is found against him, the assise shall not be taken at large to enquire of the points of the writ. 39 Ass. 13. Curia.]

[2. In an assise of mortdancestor, if the tenant alleges bastardy in the demandant, and he is certified by the Bishop to be a mulier, the assise shall not be taken at large, but only in the right of damages. 30 E. 3. 8. b.]

[3 In

[3. In a mortdancerfor, if the tenant *pleads the release of the* demandant in bar, which is denied, and *found against the tenant*, the assise shall not enquire of the points of the writ, because the plea was in bar. 39 Aff. 13. adjudged.]

pl. 32. cites S. Q. and Mich. 40 E. 3. 49.

Br. Mortdancerfor, pl. 46. cites S. C.—  
Fitzh. Mortdancerfor,

[4. In mortdancerfor of the seisin of his father, if the tenant *pleads in bar an attainder of felony of the elder brother of the plaintiff, who survived their father, and the plaintiff takes issue that he did not survive their father, and the defendant has a day to have the record of the attainder, and after the defendant makes default, by which he fails of the record, yet the assise shall be taken at large for all the points of the writ except whether the plaintiff be next heir.* 29 Aff. 11. adjudged. But *quære* (for it seems not to be law); for the plea was in bar.]

Fol. 273.

Br. Mortdancerfor, pl. 36. cites S. C.—  
Fitzh. Mortdancerfor, pl. 28. cites S. C.

[5. But in this case it shall not be enquired whether the plaintiff was next heir or not; for it is acknowledged by the plea that he is next heir, but for the record of which he has failed. 29 Aff. 11. adjudged.]

Br. Mortdancerfor, pl. 36. cites S. C.—  
Fitzh. Mortdancerfor, pl. 28. cites S. C.

[6. In an assise, if the tenant *says the plaintiff is his villain &c.* and this is found against him, yet it shall be enquired at large of the points of the writ, because *this plea was but to the person, and not to the freehold.* 31 Aff. 12. adjudged.]

[ 178 ]

Br. Assise, pl. 322. (321) cites S. C. that it was found for the

plaintiff [that he was frank], but that he was not seised, and he was awarded that the plaintiff take nothing &c. and yet they were at issue out of the point of the assise. Br. says *Quære*; for miratur ibidem.—Fitzh. Assise, pl. 305, cites S. C. and that it was awarded accordingly.

7. It seems that assise at large shall not be but upon matter in fact which lies in notice of the country. Br. Assise, pl. 80. cites 22 H. 6. 51.

## (H) In what Cases it shall be enquired at large.

[1. IN an assise, if in the pleading an ouster be not acknowledged, the seisin and disseisin shall be enquired. 37 Aff. 14.]

S. P. Br. Assise, pl. 346. (345) cites S. C.

per Finch.—Fitzh. Assise, pl. 330. cites S. C.—*When the defendant pleads issue, though it be found against him, the seisin and disseisin shall not be enquired.* *Quære* thereof, because where no ouster is confessed in pleading, nor the plea does not imply in itself an ouster as a release &c. it seems that it shall be enquired. Br. Assise, pl. 260. cites 26 Aff. 3. per Fith.

They shall enquire over of the damages, but not of the seisin and disseisin; for it is a bar, and it is out of the point of the assise. Br. Assise, pl. 156. cites 10 Aff. 18. and per Brooke, the reason seems to be, that such plea as this and release confesses in a manner that the plaintiff was seised and disseised; for it is held a notdenying. Ibid. and cites M. 15. contra, but P. 15 E. 2. according.

[2. In an assise of a rent, if the tenant *says, Hors de son fee,* and the other *says, within his fee,* if it be found within his fee, it shall be enquired further of the seisin and disseisin. 37 Aff. 14.]

[3. If

Br. Mort-  
dancestor,  
pl. 47. cites  
S. C. and it  
was found  
that the fa-  
ther of the  
demandant  
died seised,

[3. If in a mortdancestor the tenant pleads a plea that goes in bar, yet if the plea be one of the points in the writ, the assise shall be taken at large.]

[4. As in a mortdancestor, if the tenant says the plaintiff is not the next heir, and this is found against him, yet the points of the writ shall be enquired. 40 Ass. 6.]

and that he had a son and a daughter by one venter, and a son by another venter, who was the new demandant, and that he died seised, and the eldest son entered and died without issue, and that his sister is now in as heir, and though all the points of the writ were found for the demandant, and that his father died seised, and that he is heir to him, therefore the demandant took nothing by his writ; quod nota; and yet the youngest son was next heir to his father, but not as to this land; and besides, the tenant might have pleaded this matter in bar, and yet the demandant was barred. — Br. Verdict, pl. 77. cites S. C. and the plaintiff was barred. — Ibid. pl. 101. cites S. C. and though the youngest son be heir to his father now, and also that his father died seised, yet by the eldest son's entering into the land, and dying without issue after the death of the father, the sister was heir to the land. — Fitzh. Judgment, pl. 218. cites S. C. accordingly, and that the assise was adjourned into C. B. and that afterwards it was awarded that he take nothing by his writ.

[5. And in this case the assise may find, that altho' the plaintiff is the next heir, yet that he is not the next heir as to this land, for it seems that this enquiry is in regard of their enquiry at large, for the issue will not warrant it. 40 Ass. 6. adjudged.]

Br. Mort-  
dancestor,  
pl. 36. cites  
S. C. —

[6. In an assise of mortdancestor, if the tenant says, that the plaintiff has an elder brother living, and after makes default, the assise shall be taken at large. 29 Ass. 11.]

Fitzh. Mort-  
dancestor, pl. 28. cites S. C.

[ 179 ]

S. P. Br.  
Assise, pl.  
154. cites  
10 Ass. 13.  
and so see  
that the  
assise shall  
not be at  
large for an  
infant defendant.

7. Assise against an infant, he was received to plead a release of the plaintiff in bar, who said, that not his deed, and so see that an infant defendant may plead in bar, and no circumstances shall be enquired for him, as it seems; contra of an infant plaintiff. Br. Assise, pl. 149. cites 10 Ass. 1. and 8. and T. 8. and T. 10 E. 3. accordingly.

8. In no case where the tenant gives title to the plaintiff, and this is destroyed by matter of record or matter in fact, can the plaintiff make his title at large. Br. Assise, pl. 377. cites 5 H. 7. 29. per Brian Ch. J.

## (I) In what Cases it shall be taken at large.

Br. Mort-  
dancestor,  
pl. 46. cites  
S. C. —  
Fitzh. Mort-  
dancestor, pl. 32. cites S. C. — See (G) pl. 1. S. C.

[1. IN an assise of mortdancestor, if a plea be pleaded in abatement of the writ, and this is found against the tenant, yet the points of the writ shall be enquired. 39 Ass. 13. Curia.]

I do not ob-  
serve this  
any where  
in the page  
of 9, either  
9<sup>a</sup>. or 9. b. ; but it seems to intend what is said Arg. 1 E. 3. 8. b. at the end of pl. 12.

[2. In an assise by a woman, if the tenant says the plaintiff is covert baron which is found against him, yet it shall be enquired over of the points of the writ. 1 Ed. 3. 9. b.]

[3. In



[3. In a *meridancefor*, if the *tenant vouches*, and the *demandant* *counterpleads*, upon which they are at issue, and it is found against the *tenant*, yet the points of the writ shall be enquired. \* 39 Aff. 13. Curia. † 29 Aff. 48. but *quære*.]

*ancefor*, pl. 32. cites S. C. & S. P. obiter, and cites also 37 H. 6. —† Br. Mortdancefor, pl. 37. cites S. C.

[4. In an assise, if the *tenant* and *demandant* go to issue upon a matter out of the point of the assise, and this is found against the *tenant*, the assise shall not enquire of the points of the writ, but only in right of the *damages*. 44 Aff. 6. adjudged.]

[5. As in an assise, if the *tenant* pleads an entry for the alienation of his lessee to the plaintiff, and the parties go to issue whether the alienor had a fee, and it is found against the *tenant*, the assise shall not enquire of the points of the writ, but only in right of the *damages*. 44 Aff. 6. adjudged.]

[6. In an assise, if the *decd* of the ancestor of the plaintiff be pleaded in bar, and this is denied, and found for the *demandant*, it shall be enquired of the *damages* only. 17 Aff. 13. adjudged.]

—Br. Assise, pl. 211. (210) S. P. cites 17 Aff. 17. [All the editions of Brooke are 17 Aff. 17. but it seems misprinted, and that it should be 17 Aff. 13. according to Roll.] —S. P. and so if a *decd* be pleaded by assignee, and denied, and found against him. Br. Assise, pl. 175. cites 11 Aff. 26,

[7. In an assise, if the *tenant* pleads the *seoffment* of the ancestor of the plaintiff in bar, to which the plaintiff says, that the same ancestor died seised, and that he entered as son and heir, and the issue is taken upon the dying seised, and this is found for the plaintiff, it shall not be enquired at large of the points of the writ. 17 Aff. 18. adjudged.]

to take the assise at large. Br. Assise, pl. 212. (211) cites S. C.

[8. In an assise, if the *tenant* says that J. S. was seised of the land, and acknowledged a statute to him, by which he extended it &c. and the plaintiff takes issue, that J. S. was not seised of the land at the time of the statute acknowledged, and this is found for him, and against the *tenant*; it shall not be enquired of the points of the writ, but of the *damages* only, for the seisin is acknowledged. 24 Aff. 2. adjudged.]

*seised nor disseised*; and the plaintiff took nothing by his writ; but the *finding* of the seisin and disseisin was held void, for seisin was confessed before. And so see that where ouster is confessed, as appears here, that it was by the bar, there the seisin and disseisin shall not be enquired, and if it be enquired all is void, as appears here. Br. Assise, pl. 256. (255) cites S. C.

[9. In an assise, if the *defendant* says, that there is not any tenant of the freehold named in the writ, and the plaintiff says, that he hath made a seoffment to persons unknown, and he himself hath continually taken the profits, and they are at issue upon the taking the profits; if this be found against the defendant, it shall not be enquired of the points of the assise, because the disseisin is acknowledged. 30 H. 6. 1. b. Curia.]

[10. So

\* Br. Mortdancefor, pl. 46. cites S. C. & S. P. obiter. Fitzh. Mort-

Br. Assise, pl. (368) 69. cites S. C.

Fol. 274.

Br. Assise, pl. 69. (368) cites S. C. Fitzh. Assise, pl. 210. cites S. C. and 18 E. 3. 19.

17 Aff. 17. S. P. and so if a

Willowby charged them only upon the title; but

[ 180 ]

Shard used in such case

The assise found that J. S. was seised the day of the recognizance, but that the plaintiff was not

Br. Assise, pl. 339. (338) cites S. C. — Fitzh. Assise, pl. 15. cites S. C.

Br. Mort-  
dancestor,  
pl. 47. cites  
S. C. and it  
was found  
that the fa-  
ther of the  
demandant  
died seised,

[3. If in a mortdancestor the tenant pleads a *plea* that goes in bar, yet if the plea be one of the points in the writ, the affise shall be taken at large.]

[4. As in a mortlancestor, if the tenant says the plaintiff is not the next heir, and this is found against him, yet the points of the writ shall be enquired. 40 Aff. 6.]

and that he had a son and a daughter by one venter, and a son by another venter, who was the now demandant, and that he died seised, and the eldest son entered and died without issue, and that his sister is now in as heir, and though all the points of the writ were found for the demandant, and that his father died seised, and that he is heir to him, therefore the demandant took nothing by his writ; quod nota; and yet the youngest son was next heir to his father, but not as to this land; and besides, the tenant might have pleaded this matter in bar, and yet the demandant was barred. — Br. Verdict, pl. 7. cites S. C. and the plaintiff was barred. — Ibid. pl. 10. cites S. C. and though the youngest son be heir to his father now, and also that his father died seised, yet by the eldest son's entering into the land, and dying without issue after the death of the father, the sister was heir to the land. — Fitzh. Judgment, pl. 218. cites S. C. accordingly, and that the affise was adjourned into C. B. and that afterwards it was awarded that he take nothing by his writ.

[5. And in this case the affise may find, that altho' the plaintiff is the next heir, yet that he is not the next heir as to this land, for it seems that this enquiry is in regard of their enquiry at large, for the issue will not warrant it. 40 Aff. 6. adjudged.]

Br. Mort-  
dancestor,  
pl. 36. cites  
S. C. —

Fitzh. Mort-  
dancestor, pl. 28. cites S. C.

[ 179 ]

S. P. Br.  
Affise, pl.  
154. cites  
10 Aff. 13.  
and so see  
that the  
affise shall  
not be at  
large for an  
infant defendant.

[6. In an affise of mortdancestor, if the tenant says, that the plaintiff has an elder brother living, and after makes default, the affise shall be taken at large. 29 Aff. 11.]

7. Affise against an infant, he was received to plead a release of the plaintiff in bar, who said, that not his deed, and so see that an infant defendant may plead in bar, and no circumstances shall be enquired for him, as it seems; contra of an infant plaintiff. Br. Affise, pl. 149. cites 10 Aff. 1. and 8. and T. 8. and T. 10 E. 3. accordingly.

8. In no case where the tenant gives title to the plaintiff, and this is destroyed by matter of record or matter in fact, can the plaintiff make his title at large. Br. Affise, pl. 377. cites 5 H. 7. 29. per Brian Ch. J.

## (I) In what Cases it shall be taken at large.

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[1. In an affise of mortdancestor, if a plea be pleaded in abatement of the writ, and this is found against the tenant, yet the points of the writ shall be enquired. 39 Aff. 13. Curia.]

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of 9, either  
9. a. or 9. b. ; but it seems to intend what is said Arg. 1 E. 3. 8. b. at the end of pl. 12.

[2. In an affise by a woman, if the tenant says the plaintiff is covert baron which is found against him, yet it shall be enquired over of the points of the writ. 1 Ed. 3. 9. b.]

[3. In

[3. In a *mortdancesfor*, if the *tenant vouches*, and the *demandant* *counterpleads*, upon which they are at issue, and it is found against the *tenant*, yet the points of the writ shall be enquired. \* 39 Aff. 13. Curia. + 29 Aff. 48. but *quære*.] \* Br. Mortdancesfor, pl. 46. cites S. C. & S. P. obiter. Fitzh. Mortdancesfor, pl. 32. cites S. C. & S. P. obiter, and cites also 37 H. 6. —† Br. Mortdancesfor, pl. 37. cites S. C.

[4. In an *assise*, if the *tenant* and *demandant* go to issue upon a matter out of the point of the *assise*, and this is found against the *tenant*, the *assise* shall not enquire of the points of the writ, but only in right of the *damages*. 44 Aff. 6. adjudged.] Br. Affise, pl. (368) 369. cites S. C.

[5. As in an *assise*, if the *tenant* pleads an entry for the alienation of his *lessee* to the plaintiff, and the parties go to issue whether the alienor had a fee, and it is found against the *tenant*, the *assise* shall not enquire of the points of the writ, but only in right of the *damages*. 44 Aff. 6. adjudged.] Fol. 274. Br. Affise, pl. 369. (368) cites S. C. Fitzh. Affise, pl. 210. cites S. C. and 18 E. 3. 19.

[6. In an *assise*, if the *decd* of the ancestor of the plaintiff be pleaded in bar, and this is denied, and found for the *demandant*, it shall be enquired of the *damages* only. 17 Aff. 13. adjudged.] —Br. Affise, pl. 211. (210) S. P. cites 17 Aff. 17. [All the editions of Brooke are 17 Aff. 17. but it seems misprinted, and that it should be 17 Aff. 13. according to Roll.] —S. P. and so if a *decd* be pleaded by *assignee*, and denied, and found against him. Br. Affise, pl. 275. cites 11 Aff. 26.

[7. In an *assise*, if the *tenant* pleads the *feoffment* of the ancestor of the plaintiff in bar, to which the plaintiff says, that the same ancestor died *seised*, and that he entered as son and heir, and the issue is taken upon the dying *seised*, and this is found for the plaintiff, it shall not be enquired at large of the points of the writ. 17 Aff. 18. adjudged.] Willowby charged them only upon the title; but [ 180 ]

to take the *assise* at large. Br. Affise, pl. 212. (211) cites S. C. Shard used in such case

[8. In an *assise*, if the *tenant* says that J. S. was *seised* of the land, and acknowledged a statute to him, by which he extended it &c. and the plaintiff takes issue, that J. S. was not *seised* of the land at the time of the statute acknowledged, and this is found for him, and against the *tenant*; it shall not be enquired of the points of the writ, but of the *damages* only, for the *seisin* is acknowledged. 24 Aff. 2. adjudged.] The *assise* found that J. S. was *seised* the day of the recognition, but that the plaintiff was not

*seised* nor *disseised*; and the plaintiff took nothing by his writ; but the finding of the *seisin* and *disseisin* was held void, for *seisin* was confessed before. And so see that where ouster is confessed, as appears here, that it was by the bar, there the *seisin* and *disseisin* shall not be enquired, and if it be enquired all is void, as appears here. Br. Affise, pl. 256. (255) cites S. C.

[9. In an *assise*, if the *defendant* says, that there is not any tenant of the freehold named in the writ, and the plaintiff says, that he hath made a *feoffment* to persons unknown, and he himself hath continually taken the profits, and they are at issue upon the taking the profits; if this be found against the *defendant*, it shall not be enquired of the points of the *assise*, because the *disseisin* is acknowledged. 30 H. 6. 1. b. Curia.] Br. Affise, pl. 339. (338) cites S. C. —Fitzh. Affise, pl. 1. c. cites S. C.

[10. So

And it is as strong against the defendant as if he had traversed the title of the plaintiff, and this had been

found against him. Br. Affise, pl. 294. cites 22 Aff. 1. but it seems it should be 29 Aff. 1. and so are the other editions. — Fitzh. Aff. pl. 275. cites S. C.

[9. In an affise, if the tenant pleads a fine and execution in bar, and the estate of the plaintiff mesne &c. if the plaintiff destroys this bar by a fine with warranty, and so falsifies the execution, and the tenant pleads to this nul tiel record, and after the record is shewn forth, the affise shall be awarded only in right of the damages; for this issue was upon the title, and this is found against the tenant. 29 Aff. 1. adjudged.]

10. The Court *ex officio* ought to award the affise at large, where bar is pleaded against an infant plaintiff in affise; per Hank: quod non contradicatur. Br. Office del &c. pl. 3. cites 12 H. 4. 22.

(L) In what Cases it shall be awarded at large, in respect of the Person. [*Infant, Baron and Feme.*]

See (M) pl. 9. S. C. and (N) pl. 6. S. C.

[1. IF an infant of the age of 15 brings an affise of gavel-kind land, where by the custom such infant has power to alien as well as a man of full age, and the tenant pleads in bar, the affise shall be awarded at large. 32 Aff. 4. adjudged.]

\* Br. Affise, pl. 270. (269) cites S. C. and a deed of the

[2. In an affise by 2, of whom one is within age, the affise shall be awarded at large. 26 Aff. 14. Contra \* 26 Aff. 65. adjudged. Contra † 28 Aff. 22.]

ancestor being pleaded in bar, he of full age was compelled to answer to the deed, and he said that nothing passed, pris &c. and for the other within age the affise was awarded to enquire of the circumstances; and concordat 28 E. 3. pl. 22. But it was said that the contrary was done twice. — Fitzh. Affise, pl. 245. cites S. C. — And in such case both parties shall not have the affise at large, because the one is of full age, and shall answer to the deed. Ibid. pl. 303. cites 29 Aff. 53.

† Br. Affise, pl. 284. (283) cites S. C. — Fitzh. Affise, pl. 269. cites S. C. — See (M) pl. 154 S. C. — (N) pl. 2. S. C.

In affise against 4, 2 pleaded a release of the plaintiff in bar, which was denied, and witnesses were named, and they were sworn at the affise, and were charged upon the deed, and because one of the tenants was within age, they were charged over of the disseisin; and so see that an infant, by pleading of a false deed, shall not be attained disseisor. Br. Affise, pl. 179. cites 12 Aff. 12, 13.

Br. Affise, pl. 284. (283) cites S. C. — Fitzh. Affise, pl. 269. cites S. C.

[3. In an affise by baron and feme of full age, the affise shall not be awarded at large for the coverture of the woman. 26 Aff. 14. 28 Aff. 22.]

[ 183 ]

(M) Upon what Plea.

[1. IN an affise by an infant, if a matter which is not of record is pleaded in bar, the infant shall not be put to answer thereto, but the affise ought to be awarded at large.]

Affise by 2 coparceners, the one of full age, the other an in-

[2. In an affise by an infant, if the tenant pleads a partition by coparceners &c. in bar, yet the affise shall be awarded at large, without having respect to the bar. 30 Aff. 7.]

fant,

*fant, against the 3d coparcener, who pleaded partition in bar against the one of full age, and to the assise, against the other within age, and he pleaded so against the infant, because he knew that against him the assise shall be awarded at large; and nevertheless per Cur. he shall plead against the infant as if he was of full age, and suffer the Court ex officio to award it at large; and because he has pleaded in bar against the one, and to the assise against the other, by this he has waved his bar; quod nota, by which he pleaded the partition in bar against both, and the others made title, and traversed the partition; quod nota. Br. Assise, pl. 310. (309) cites S. C.*

[3. So if a feoffment with the warrahty of the ancestor of the plaintiff be pleaded in bar, the assise shall be awarded at large. S. P. Br. Assise, pl. 341. cites 30 Aff. 27. \* 18 Aff. 11. † 31 Aff. 17. adjudged 12 H. 4. 22.] 35 Aff. 9. the deed

having witnesses. — S. P. that the assise shall be awarded of all the circumstances of the deed, and if it be found good, yet it shall be enquired if the infant was seized. Br. Assise, pl. 204. cites 16 Aff. 9.

— S. P. but if he makes title, and it be found against him, it shall be enquired if he has other title. Br. Assise, pl. 59. cites 12 H. 4. 19. 40. per Hank. — But where the infant is defendant in assise, and pleads a bar which is found against him, no other title nor circumstance shall be enquired. Ibid. —

The Court ex officio ought to award the assise at large, where bar is pleaded against the infant plaintiff in assise; per Hank. quod non contradicatur. Br. Office del Court, pl. 3. cites 12 H. 4. 22. — Fitzh. Assise, pl. 50. cites 12 H. 4. 20. S. P.

\* Br. Testmoignes, pl. 10. cites S. C. — Fitzh. Process, pl. 24. cites S. C.

† Fitzh. Condition, pl. 15. cites S. C.

In assise, the tenant pleaded a bar, the plaintiff made title by lease of the tenant to the plaintiff for life, to which the tenant did not answer, by which the assise is taken at large as it ought, which found that the tenant leased to the plaintiff for life, rendering rent, with clause of re-entry, and for the rent arrears entered, and by all the justices, where assise is awarded at large, as here, because the title is not answered, the plaintiff and defendant shall have advantage of all that is found, though it be not pleaded; and if other title, than the plaintiff made, be found, it is good, and so here the tenant shall have advantage of the condition not pleaded, and so he had. Br. Assise, pl. 290. cites 18 Aff. 48. — S. P. Ibid. pl. 411. cites P. 32 E. 3. for it is no otherwise now but as if nul tort had been pleaded.

[4. So if a divorce for a pre-contract between the father and the mother of the plaintiff be pleaded in an assise, he being an infant, and so the plaintiff a bastard, the assise shall be awarded at large. 30 Aff. 45. adjudged.] Br. Assise, pl. 317. (316) cites S. C. as of a divorce in general.

[5. So in an assise \* by an infant, if bastardy be pleaded in the infant, the assise shall be awarded at large. 39 Aff. 14. by all the justices.] S. P. and see Assise at large where matter in fact is

pleaded. Br. Assise, pl. 356. (355) cites S. C. — And though the infant was a female covert, and her baron was of full age. Br. Verdict, pl. 47. cites S. C.

\* The Orig. is (verfi.) viz. against; but see (O) pl. 11. and the notes.

[6. In an assise by an infant, if the tenant pleads in bar the devise of his ancestor according to the custom of a vill, with proclamations, the infant shall not be put to answer this, but the assise shall be \* awarded at large. 37 Aff. 5. adjudged.] \* Otherwise it is error. Br. Assise, pl. 344. (343) cites S. C.

[7. In an assise against an infant, if the tenant pleads in bar a matter of estoppel of record to estop the plaintiff to claim as heir, upon which the plaintiff demurs, and this is adjudged against the infant, yet the assise shall be awarded at large for the infancy. 30 Aff. 46. 51. adjudged.] [184.] Br. Estoppel, pl. 138. cites S. C. — Br. Mortdancestor, pl. 56. cites 30 Aff. pl. 46. See (F)

pl. 3. and the notes there. — See pl. 10, 11, 12.

[8. In

Br. Esstop-  
pel, pl. 138.  
cites 30 Aff.  
46. 52.

[8. In an affise by an infant, if the tenant pleads in bar, and the plaintiff replies, and the tenant rejoins, yet the affise shall be awarded at large, because the plaintiff is an infant, for that which is alleged by the tenant shall not be held, Not denied by him. 31 Aff. 15. dubitatur.]

Fol. 276.

See supra  
(L) pl. 1.  
S. C. and  
(N) pl. 6.  
S. C.

[9. In an affise by an infant of gavelkind lands, if the tenant says that the custom there is, that an infant of the age of 15 may alien, and that he was of the age of 15, and aliened to him, yet the affise shall be awarded at large, though he be of full age to alien. 32 Aff. 4. adjudged.]

S. P. ac-  
cordingly by  
Hanke. Br.  
Affise, pl.  
59. cites 12  
H. 4. 19,  
20. [and is the S. C. continued at 22.]  
See pl. 7.

[10. In an affise by an infant, if the tenant pleads in bar a mat-  
ter of record against the infant, the affise shall not be awarded at  
large, but the infant shall be put to answer the record. 12 H. 4.  
22. b.]

Fitzh. Af-  
fise, pl. 235.  
cites S. C.

[11. As if a fine be pleaded in bar against him, he ought to  
answer it, and the affise shall not be taken at large. 37 Aff. 5.  
per Chelre. The same law if a recovery be pleaded in bar.  
26 Aff. 6.]

Br. Affise,  
pl. 278.  
(277) cites  
S. C.—  
See (P) pl.  
6, 7. S. C.  
—Where  
an infant  
plaintiff in  
affise makes title against a fine, as here, and the [tenant] tenders to traverse the title, there the affise shall be awarded at large in advantage of the infant, and yet if other title be found for the infant by the affise at large, this suffices, and he shall recover. Br. Titles, pl. 29. cites 26 Aff. 6.

[12. But in an affise by an infant, if the tenant pleads a matter  
of record, as a fine of his ancestor, or such like &c. though the in-  
fant ought to answer this, and make a title, yet the tenant shall  
not be received to traverse the title, but the affise shall be awarded  
at large, because if the infant hath other title found he shall have  
judgment. 28 Aff. 6. per Curiam adjudged.]

Affise by  
two, the one  
an infant,  
the other of  
full age, and  
deed of the

ancestor with warranty is pleaded in bar, both parties shall not have the affise at large, because the one is of full age, and shall answer to the deed; and where they said that after this their ancestor was seized and died seized, and deed indented of the ancestor of the lease for life is pleaded, he shall not say that nothing passed by the deed, by reason that an infant shall not be suffered to make a nient dedire of the deed, as this is. Br. Affise, pl. 303. cites 29 Aff. 53.

\* Fitzh.  
Affise pl.  
269. cites  
S. C. but I  
do not ob-  
serve S. P.

[14. But in an affise by baron and feme, if the release of the  
baron be pleaded in bar, the affise shall not be awarded at large.  
26 Aff. 14. \* 28 Aff. 22.]

Fitzh. Af-  
fise, pl. 269.  
cites S. C.  
and S. P.—  
See (L) pl.  
1. S. C.

[15. In an affise by two, of whom one is within age, if the  
tenant says that he himself was seized &c. and leased for life to the  
ancestor of the plaintiffs, who died, and the plaintiffs abated claim-  
ing his estate, the affise shall not be awarded at large as to him  
who

who is of full age, but he ought to answer the deed. 28 Aff. 22. adjudged.]

[16. In an assise of a rent against an infant, if the parties join issue upon a matter out of the point of the assise, and this is tried against the infant, yet the assise shall be awarded at large, because the infant by his acknowledgment or nient dedire shall not be adjudged a disseisor. 28 Aff. 51, 52. adjudged.]

Br. Assise, pl. 293. (292) cites S. C. & S. P. — S. P. because the infant has pleaded

in bar, and joined issue out of the point of assise, but if he had pleaded to the assise the circumstances should have been enquired; contra now. And so see circumstances enquired for infant defendant. Br. Assise, pl. 292. (291) cites S. C. — Fitzh. Assise, pl. 162. cites S. C. and 27 Aff. — See (O) pl. 18. S. C.

17. In assise, the parties are adjourned upon plea to the writ, which is awarded a good writ, the assise shall not be awarded in point of assise as upon adjournment upon a bar, but the parties shall plead; quod nota; for no default in the party. Br. Assise, pl. 432. cites 6 E. 3. 1. and Fitzh. Assise, 168.

18. Assise against two, the one pleaded a release of the plaintiff of all actions, and of all the right, and the assise was prayed because he who pleaded did not take the tenancy upon him, for if he does not do it the assise shall be awarded, and after the other took the tenancy, and pleaded in bar the same deed as assignee of the first who pleaded &c. and the deed was denied &c. and if the plaintiff had confessed the deed in the hands of him who first pleaded, the writ had abated against all. Br. Assise, pl. 166. cites 11 Aff. 9.

(N) In what Cases it shall be enquired of the Circumstances. In respect of the Person of the Plaintiff [Infant, or Feme Covert.]

[1. In an assise, if the plaintiff be an infant, the Court ex officio ought to enquire of the circumstances. \* 12 H. 4. 22. b. 21 Ed. 3. 21. 38 Aff. 2. † 31 Aff. 17. 24 Aff. 6.]

\* Br. Office del Court, pl. 3. cites S. C. & S. P. accordingly. 4. 20. S. C.

† Fitzh. Condition, pl. 15. cites S. C.

— Fitzh. Assise, pl. 50. cites 12 H.

[2. So in an assise, if there are two plaintiffs, and one is an infant, it ought to be enquired of the circumstances. \* 12 H. 4. 22. b. † 31 Aff. 17. 32 Ed. 3. Assise 96. Contra || 26 Aff. 65. adjudged.]

\* Fitzh. Assise, pl. 50. cites S. C. — † Fitzh. Condition, pl. 15. cites S. C.

|| Br. Aff. pl. 270. (269) cites S. C. and for the third within age it was awarded to enquire of the circumstances. — See (L) pl. 2. S. C.

[3. In an assise against an infant it shall be enquired of the circumstances. 36 Aff. 14. admitted.]

Br. Assise, pl. 356. (355) cites S. C.

[4. In an assise against baron and feme, the baron being of full age, the feme being of full age,

(355) cites age, and the feme within age, it shall be enquired of the circumstances. 39 Aff. 14. 16.]

S. C. — Fitzh. Affise, pl. 337. cites S. C.

[ 186 ]

Fitzh. Affise, pl. 337. [5. The same law in an affise against baron and feme, if the feme be received upon the default of the husband, though she be of full age, because she is a feme covert. 39 Aff. 16. adjudged.]

—Affise against baron and feme of a rant, the feme within age was received, and pleaded hors de son fee &c. and the plaintiff shewed deed of grant, and that he was seised and disseised &c. And the affise was taken of all the circumstances which may void the deed. And so note affise of circumstances, where the defendant is an infant, and upon the plea of hors de son fee, as well as of nul tort. Br. Affise, pl. 363. cites 43 Aff. 5.

See (L) pl. 1. and (M) [6. If an infant brings an affise of gavel-kind land, being above the age of 15, where the custom is, that he may alien the land at that age, as well as a man at full age, and the tenant pleads in bar, upon which the affise is awarded; it shall be enquired of the bar; and if this be found against the infant, it shall be enquired whether he hath other title, although he was of full age to alien. 32 Aff. 4.]

Fol. 277. [7. Where an infant is put to answer a plea in bar, there it shall never be enquired of the circumstances of the bar. 22 H. 6. 51. b. Curia.]

Br. Affise, pl. 80. cites S. C. — Fitzh. Affise, pl. 12. cites S. C.

S. P. And where he shall be compelled to answer, there the affise shall not be [8. In an affise by an infant, if the defendant pleads a release of the ancestor of the plaintiff by fine with warranty, the affise shall not be taken to enquire of the circumstances, because this is a matter of record, to which the infant of necessity ought to answer. 22 H. 6. 51. b. Curia.]

awarded to enquire of the circumstances; as it is where a record is pleaded in bar, he ought to answer. Br. Affise, pl. 80. cites 22 H. 6. 51. S. C. — Fitzh. Affise, pl. 12. cites S. C. — S. C. cited Cro. J. 463. in pl. 13. by Houghton J.

S. P. and shall enquire also of the title of the plaintiff, if [9. In an affise by an infant, if the deed of his ancestor with warranty be pleaded in bar, the affise shall be awarded to enquire of the circumstances. 32 Ed. 3. Affise 98.]

the deed be found good. Br. Affise, pl. 171. cites 11 Aff. 19. — Ibid. pl. 137. S. P. cites 8 Aff. 28.

[10. Affise of rent by an infant, the tenant said, that the plaintiff himself is seised of the land, out of which the rent arises, judgment of the writ; and because the plaintiff was an infant, he was not compelled to answer to it, but the affise awarded of the circumstances notwithstanding it is only to the writ. Br. Affise, pl. 164. cites 11 Aff. 6.]

[11. Affise against an infant, who pleaded a release in bar, and it was denied, and the issue was taken without having regard to the infancy; and so it seems that the affise shall not be taken at large, but for an infant plaintiff only, and not for an infant defendant.]



*Jendant.* Br. Assise, pl. 412. cites H. 12 E. 3. and Fitzh. Assise, 187. But *contrarium* *scpe*.

(O) Upon what Issue.

[1. If an infant brings an assise, and a bar is pleaded against him, it shall be enquired at large: 12 H. 4. 22. b. 38 Ass. 2. adjudged. 29 Ass. 68. 18 Ass. 11.]

as well where the defendant is an infant, as where the plaintiff is an infant. Br. Assise, pl. 21. cites 44 E. 3. 10.

[2. So if a record be pleaded in bar against an infant, and the infant makes title against it as he ought, yet it shall be enquired whether he hath other title. 12 H. 4. 22. b. 38 [18] Ass. 6. Curia \* 22 H. 6. 51. b.]

[3. So if the warranty of the ancestor be pleaded in bar against an infant, because the infant cannot answer the deed, it shall be enquired of the bar; and if the bar be found, it shall be enquired of all things which may avoid or destroy the warranty, or if he hath other title. 12 H. 4. 22. 31 Ass. 17. adjudged.]

[4. So if the devise of the ancestor of the infant be pleaded in bar. 39 Ass. adjudged.]

[5. In an assise by an infant, and man of full age, if the deed of their ancestor be pleaded in bar, yet it shall be enquired of the circumstances. 31 Ass. 17.]

[6. But if an infant brings an assise, and upon nul tort, nul disseisin pleaded, it is found against the plaintiff; this by intendment is an enquiry of the circumstances, for upon this issue they may enquire of any right. 12 H. 4. 22. b.]

[7. In an assise by an infant, if a record be pleaded in bar, and the defendant has day to bring in the record, and this is brought accordingly at the day, yet the assise shall be taken for the infant; (it seems it is intended at large, to enquire whether he hath other title.) 29 Ass. 11. but *quære*.]

ing the failer of record——Fitzh. Mortdancestor, pl. 28. cites S. C.

[8. So if an infant and a man of full age are plaintiffs in the case aforesaid, the assise shall be taken for the infant. 29 Ass. 11. but *quære*.]

[9. In an assise by an infant in B. R. if the tenant pleads a matter of record in bar, scilicet, a recovery by him against the plaintiff

See (M) pl. 3. and the notes there. Assise shall be at large, pl. 21. cites

[ 187 ] See (M) pl. 3. and the notes there. \*See (M) pl. 8. and the notes there.

See (M) pl. 3. and the notes there.

This point is at 38 Ass. pl. 2. but not at 39 Ass. pl. 4.

See (M) pl. 13. S. C.—Fitzh. Condition, pl. 15. cites S. C. Fitzh. Assise, pl. 50. cites S. C. but I do not observe S. C. there.

Br. Mortdancestor, pl. 36. cites S. C. and the assise was awarded at large, not without stand-

Br. Mortdancestor, pl. 36. cites S. C.—Fitzh. Mortdancestor, pl. 28. cites S. C.

Cro. J. 464. pl. 12. S. C. adjudged accordingly.

2 Roll Rep.  
14. Hill.  
15 Jac. B. R.  
and 22  
Pasch. 16  
Jac. B. R.  
S. C. argued  
by the  
judges, and  
adjudged for  
the plaintiff,  
against the  
opinion of Haughton J. and the assise was taken in right of damages.

in another assise brought by him in the Common Pleas, to which the plaintiff replies, that he is yet within age, and that this writ was purchased, and bore date before the writ brought in Banco, upon which the tenant demurs, and this is adjudged a good replication, the assise shall be taken only in right of the damages, for by the demurrer the ouster and disseisin of the plaintiff is confessed. P. 16 Jac. B. R. between *Holford and Platt* adjudged, and so taken.]

\* Br. Assise,  
pl. 59. cites  
12 H. 4. 19.  
20. S. P.  
and is S. C.  
—Fitzh.  
Assise, pl.  
50. cites

[10. If an infant be defendant in an assise, and pleads in bar; and a title is made against him, to which the tenant answers and takes issue out of the point of the assise, and it is found against him, it shall not be enquired of the circumstances for the tort supposed in the infant. \* 12 H. 4. 22. b. † 28 Aff. 50. adjudged.]

12 H. 4. 20. S. P. and is S. C.

† Br. Assise, pl. 292. (291) S. P. cites 28 Aff.

51. but if he had pleaded to the assise, then the circumstances should have been enquired; contra now—Fitzh. Assise, pl. 262. cites 28 Aff. 51. S. P.—[And it seems that Roll is misprinted, (50) for (51)]—See pl. 18. infra, and (M) pl. 16.

[ 188 ]

Fol. 278.

[\* This appears by the Year-book to be a mistake, where

[11. In an assise \* against baron and feme, the feme being within age, if the defendants by way of bar plead that *f. was seized, and the feme is heir to him*, if the plaintiff says that the feme is a bastard, this shall not be tried by the ordinary, but by the assise, because the circumstances are to be enquired, and because the feme is not compellible to take issue upon a certain point. 39 Aff. 14.]

it is said to be brought by baron and feme, and that the defendant said that the feme is a bastard.—S. P. Br. Assise, pl. 356. (355) cites S. C. and is according to the Year-book; and they shall not write to the bishop but upon issue joined of bastardy, and so see Assise at large where matter of fact is pleaded.—Br. Verdict, pl. 47. cites S. C. and S. P.—Br. Certification de Eveque, pl. 17. cites S. C.

& S. P.

In assise, they were at issue upon special bastardy, and it was tried by the assise, and per Tank, every bastardy pleaded in assise shall be tried per pais, and because the Court saw by inspection that the tenant was within age, so that the matter alleged by the plaintiff cannot be a nient desire of it, the assise was taken at large, and first enquired of the bar, and further of the seisin and disseisin, and found for the plaintiff, and he recovered. Br. Assise, pl. 351. cites 38 Aff. 24.

[12. In an assise by an infant, if the deed of the ancestor of the infant with warranty, bearing date in another county, be pleaded against him, the assise shall be adjourned in Bank, and there it shall be enquired of the deed; and if it be found his deed, the assise shall be re-attached, and there shall be an enquiry whether he has any other title than by descent of the inheritance. 39 Aff. 14. per Thorp. Obiter.]

Fitzh. Assise, pl. 337. cites 39 Aff. 6. S. P. [but seems misprinted for 39 Aff. 16.]

[13. [So] in an assise against baron and feme, if the feme be received upon the default of the husband, and pleads in bar the deed of the ancestor of the plaintiff with warranty, and the other says nothing passed by the deed, upon which they are at issue, which is found against the feme; yet because she is a feme covert it shall be enquired of the seisin and disseisin, for she shall not be adjudged a disseisorefs by this without a finding of it. 39 Aff. 16. adjudged.]

[14. The

[14. The same law, although the feme acknowledges an ouster by her plea. 44 Aff. 31.]

[15. In an assise against an infant, if he pleads the release of the ancestor of the plaintiff with warranty, to which the plaintiff says, that the said ancestor was tenant for life, the remainder in tail to the plaintiff, the remainder to the right heirs of the ancestor, and granted over his estate to him to whom the release was made, and after released with warranty to him, upon which plea the parties demur, and after the assise is awarded, the assise shall enquire whether he, to whom the release was made, was seised in fee at the time of the release, because nothing shall be taken not denied by the infant. 44 Aff. 28.]

[16. In an assise of a rent against an infant, if the infant says not charged by the deed, and this is found against him, yet it shall be enquired of the seisin and disseisin. 26 Aff. 3. dubitatur.]

that where the defendant pleads issue, tho' it be found against him, the seisin and disseisin shall not be enquired. But Brooke says, Quære inde, because where no ouster is confessed in pleading, nor does the plea imply in itself an ouster, as release, and the like, it seems that it shall be enquired.

[17. In an assise against an infant, if he pleads a record, and fails thereof, yet he may plead to the assise afterwards, for he shall not be concluded by his plea. 26 Aff. 3.]

[18. In an assise of a rent-charge against an infant, if issue be joined upon a matter out of the point of the assise, and this is found against the infant, yet it shall be enquired of the circumstances for the benefit of the infant. 28 Aff. 51. \* agreed. 52 adjudged, because the infant by his consuance or nient dedire cannot be adjudged a disseisor.]

\* Br. Assise, pl. 293. cites S. C.—See pl. 10. S. P. contra and the notes there.—See (M) pl. 16. S. C.—

Assise against an infant who pleaded a release in bar, and it was denied, and the issue was taken without having regard to the infancy; and so it seems that the assise shall not be taken at large but for an infant plaintiff only, and not for an infant defendant. Br. Assise, pl. 412. cites H. 12 E. 3. and Fitch. Assise, 107. But Brooke says, tamen contrarium sapere.—Br. Assise, pl. 292. cites 28 Aff. 51. accordingly.—See (M) pl. 16.

[19. So in an assise against baron and feme, if the feme being received upon the default of her husband joins issue upon a matter out of the point of the assise, and this is found against her, yet it shall be enquired at large. 28 Aff. 52. per Fitch.]

## (P) How the Enquiry shall be.

[1. IN an assise by an infant, if the tenant pleads a matter in bar, and the assise is awarded at large to enquire of the circumstances because the plaintiff is an infant, yet the assise ought to enquire of the matter alleged in the bar, by the tenant, or otherwise it is erroneous. \* 31 Aff. 22. adjudged. 32 Aff. 4. † 18 Aff. 11.]

\* And because they took the assise without enquiring of the bar, therefore it was reversed by error,

and so see that in assise at large the bar shall be enquired as well as the circumstances for the infant, which is clear law. Br. Assise, pl. 325. (324) cites S. C.—Br. Error, pl. 126. cites S. C. & S. P.

† Fitch. Process, pl. 24. cites S. C.

Fol. 279.

[2. *And they ought first to enquire of the bar.* 32 Aff. 4. 18 Aff. 11.]

Br. Assise,  
pl. 325.  
(324) cites  
S. C. —  
Br. Error,  
pl. 126. cites  
S. C.

[3. In an assise by an infant, if the tenant pleads in bar, upon which the assise is awarded to enquire of the circumstances, the assise ought to enquire for the advantage of the tenant as well as for the plaintiff, of more than he has comprehended within his bar, if it be in fortification of the bar, because although the tenant has not pleaded it in bar, yet he might have pleaded it in his rejoinder if the plea had been the plaintiff's, and so the assise had not been awarded at large. 31 Aff. 18. 22. adjudged.]

See 31 Aff.  
pl. 22.

[4. But it seems that the jury is not bound to enquire of such a thing, which the tenant could not have pleaded in his rejoinder without a departure.]

[5. If a bar is pleaded in an assise by an infant, and the assise is awarded at large to enquire of the circumstances; when the assise hath enquired of the bar, if they find this against the plaintiff, they ought to enquire whether he hath other title. 32 Aff. 4.]

Br. Assise,  
pl. 278.  
(277) cites  
S. C. and  
the title set  
forth by the  
infant shall  
be entered

[6. In an assise by an infant, if the tenant pleads a fine of the ancestor of the plaintiff, or other matter of record, and the plaintiff makes answer as he ought, this being a matter of record, and upon this the assise is awarded at large, because the plaintiff is an infant, the assise ought to enquire of the title first. 28 Aff. 6.]

in the roll, and not generally, for the assise is awarded at large; and yet if the jury in this assise finds other title for the infant plaintiff, it is good. — See (M) pl. 12. S. C. and the notes there.

See (M) pl.  
12. S. C.

[7. *And if they find the title against the infant, they shall enquire whether he hath other title.* 28 Aff. 6. Curia.]

8. In assise, the tenant by bailiff pleaded in abatement of the writ by misprison of the vill, and over to the assise, which remained for default of jurors, and now the tenant made default, and the assise was taken by default without enquiring of the 1st exception, quod nota bene. Br. Assise, pl. 160. cites 10 Aff. 30.

9. Assise of rent against 2, the one pleaded never seised &c. and the other hors de son fee, the plaintiff shewed a deed of the rent, the defendant denied it, the deed shall be first tried, quod mirum, for the other issue goes to the writ. Br. Assise, pl. 220. cites 18 Aff. 7.

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10. In assise, the tenant pleaded a release, the plaintiff denied it, and process was made against the witnesses, and at the day the defendant made default, and therefore continuance was not made, but the assise awarded in point of assise, and not upon the bar, for this is waved by the default. Br. Assise, pl. 221. cites 18 Aff. 8.

11. In assise by executors, they were in a manner compelled to shew cause, scilicet, title in the plaint, and so they did, scilicet, that the tenant was bound in a statute merchant to the testator, and the executors sued execution for non-payment, and were seised and disseised by the tenant; the tenant said that he paid the money to the testator, and shewed acquittance thereof, & non allocatur, but the assise awarded if execution was made or not, without enquiring

of the payment or acquittance, for if it be so, then he shall have audita querela. Br. Affise, pl. 279. cites 28 Aff. 7.

12. In affise against an infant and two others, each took the entire tenancy upon him severally, and pleaded in bar; and the plaintiff chose the infant for tenant, and said, that the others had nothing, and made title, upon which they were at issue, and the affise awarded, to enquire first who was tenant, and if they found the infant tenant, then to enquire of the title; which found the infant tenant the day of the writ purchased, and found the title for the plaintiff, and after enquired of the disseisor, who said that the two disseised the plaintiff to the use of the infant, and that the infant at the time of the disseisin was of the age of one year and a half, upon which it was awarded that the plaintiff shall recover, and after error was brought, because upon this disseisin the infant is not tenant, but the two disseisors, by reason of the nonage of the infant; and that they ought to award the plaintiff to be barred for mis-electing of his tenant, which Markham agreed. And the best opinion there was, that by disseisin to the use of the infant, the infant is not disseisor nor tenant without actual entry; for agreement of an infant to a tort, does not make him a tortfeasor, & adjournatur, as appears in the written book, and not in the printed book; and it was admitted clearly upon this matter, that the infant was not tenant. Br. Affise, pl. 46. cites 3 H. 4. 16.

13. In affise, if the tenant pleads in bar, and confesses no ouster, and the bar is found for the plaintiff, yet the seisin and disseisin shall be enquired; contra in attain taken upon affise. Br. Affise, pl. 52. cites 8 H. 4. 23.

## (Q) Proceedings.

1. WHEN an affise is arraigned, it is not enough to demand the recognitors, and to read the writ and the count in French, but the clerk ought to read the count in Latin as it is entered on record, for till then the Court is not possessed of it, and if it is not read in Latin, it was doubted per Cur. if it may be read and entered in another term, they counting again at the bar, or if the affise be discontinued, notwithstanding the recognitors were adjourned the last term; but in this case they proceeded. Sid. 73. pl. 3. Pasch. 14 Car. 2. B. R. Windebank v. Beere.

2. The plaintiff arraigned the affise the first day of term, when the defendant being demanded, made default, ideo capiat affisa per defaultam; then the demandant counted and shewed his patent from the King of the office, and it was read, and the jury not being sworn, day was given till Wednesday next, and then the defendant (as the Court said) may give what evidence he can, but not plead either in abatement or bar of the affise, nor can he then challenge. 2 Lev. 120. Hill. 25 & 26 Car. 2. B. R. in Case of Cragg v. Norfolk.

3. A juror cannot be withdrawn in an affise, for then the affise would

would be depending; per Cur. Mod. 128. pl. 28. Pasch. 26 Car. 2. B. R. [in Case of Cragg v. Norfolk.]

4. Affise was brought of the office of Marthalsea; per Holt Ch. J. the jury must first appear, and be called and sworn; then the writ is to be delivered into Court, and the count ought to be in parchment, and annexed to the writ, and if the writ be returnable on a return day, then is the affise to be arraigned upon the quarto die post, but if returnable on a common day as this was, then if the affise be not arraigned upon that day, it is ill. In this case the jury appeared and were sworn, and the writ was delivered into Court, and the affise was arraigned in French, and the tenant demanded; but the count not being in Court, the counsel for the tenant insisted upon it, that the tenant could not be demanded (which was allowed by the Court) and that therefore the demandant should be non-suited; but the Court said they were sufficiently possessed of the cause by the writ being returned into Court, and upon that gave day to the demandant, till the day following, and adjourned the jury to the same day; upon which day I was informed, after the jury sworn, and the plaint read, the counsel for the tenant demanded oyer of the writ, which being read, and the demandant having still neglected to bring his count into Court (as he was directed by the Court to do) the tenant could not be demanded, and the Court then refusing the favour of further day, the demandant was non-suited. Comb. 173. Mich. 1 W. & M. B. R. Saviere v. Lenthal, and al.

## (R) Adjournment. Proceedings upon Adjournment. How.

1. **I**N mortdancestor of rent, the defendant pleaded *hors de son fee in pais*, and after they were adjourned into Bank, *if he shall shew deed or not?* and at the day in Bank he would have shewed deed, and could not, for they were adjourned upon a certain point. Br. Adjournment, pl. 14. cites 14 Aff. 17.

S. P. Br.  
Resceit, pl.  
89. cites  
S. C.—

2. *Feme covert was received after adjournment in affise, where she and her baron had pleaded to a point certain.* Br. Adjournment, pl. 15. cites 16 Aff. 16.

The prayee

to be received was not admitted after adjournment to change his plea, and plead another at the day. Br. Adjournment, pl. 15. cites 16 Aff. 7.

3. Justices assigned shall not amend the record after adjournment of the affise in Bank. Br. Adjournment, pl. 16. cites 17 Aff. 2.

4. Affise in pais, the tenant pleaded by bailiff which passed for the plaintiff, and it was adjourned into Bank for the difficulty of the verdict, and there judgment was given for the plaintiff, and after the defendant shewed matter to have certification, and prayed certificate, and was compelled to sue to remove the record again before the

*the justices of assise, and then he shall have it there, but not in Bank,* notwithstanding that the judgment was given in Bank; and so see Adjournment in Bank, and after that judgment was given there the record remained there till it was removed again; quod nota. Br. Adjournment, pl. 5. cites 21 E. 3. 3. [ 192 ]

5. In assise, the *tenant pleaded a foreign release*, and upon this adjourned into Bank, and thence sent into the foreign county by nisi prius to be tried there; quod nota; that the foreign issue in assise shall be tried by nisi prius; and at the nisi prius the defendant made default, by which the assise at the day in Bank was remanded in pais to be taken, and re-attachment sued against the others; and so it seems, that in assise against several, the one pleads a foreign deed, the others shall not have day in Court till this issue be tried. Br. Assise, pl. 234. cites 22 Ass. 11.

6. The defendant may *relinquish his plea at the day of adjournment* where the assise was adjourned upon the plea of the other. Nota. Br. Adjournment, pl. 17. cites 23 Ass. 4.

In assise, if the tenant had demurred upon point cer-

tain, the tenant at the day of the adjournment cannot waive the demurrer and tender an issue, because it is contra to the demurrer upon which they were adjourned. Br. Adjournment, pl. 22. cites 39 E. 3. 6. — S. P. Br. Assise, pl. 355. cites 39 Ass. 6. [pl. 10.]

7. In assise, they were adjourned out of the country to Westminster, and there the defendant demanded judgment, because the plaintiff had not patent of assise; per Thorp, it is not material, for we are out of the county upon demurrer, so that if he had patent in pais upon the taking of assise it suffices; quod nota. Br. Assise, pl. 296. cites 29 Ass. 21.

8. The plaintiff was admitted to make a new title after they were adjourned upon an estoppel pleaded. Br. Adjournment, pl. 20. cites 32 Ass. 9. Br. Estoppel, pl. 140. cites S. C.

9. Assise upon issue of bastardy, they wrote to the bishop of the diocese where the land is, and not to the bishop of the diocese where the birth is alleged, and they were in doubt, whether they should put the parol without day or not, and at last, by great deliberation, they adjourned the parties to their next sessions, and that in the mean time they should sue a writ to the bishop, to certify &c. at which day the bishop did not return any writ, by which sicut alias was awarded, and a day given over to the next sessions. Br. Assise, pl. 353. cites 38 Ass. 30.

10. In assise against two where each takes the entire tenancy and pleads in bar, and the plaintiff chuses his tenant, and answers to his bar, and for difficulty the assise was adjourned to Westminster. The justices said, that they ought to have enquired in pais who was tenant before the adjournment; and if any other be enquired before it be enquired who is tenant, it is erroneous. Thel. Dig. 150. lib. 11. cap. 37. f. 5. cites 35 Ass. 2, 3. and Pasch. 11 H. 4. 67.

11. Certificate of assise; the justices of assise adjourned the parties before themselves in C. B. at Westminster for difficulty, [and this was] by Hank, and his companion justices of assise in the county of T. for by him, though the statute does not s<sup>t</sup> of adjournment

Br. Certificate of assise, pl. 4. cites S. C. — Fitzh. Certificate, pl.

3. cites  
S. C.

*journment upon certificate, it intends that it lies as well as upon assise itself, and upon this they hear the matter in Bank; quære if it be not by the equity of the statute of adjournment, Mag. Chart, cap. 12. Br. Adjournment, pl. 3. cites 12 H. 4. 9.*

Fitzh. Ad-  
journment,  
pl. cites  
S. C.

12. Assise in Cumberland between S. and Dacres and others, it was adjourned into Bank by Babbington and Strange, because *the parties came with a great rout of people armed; and because it was a great matter, and for the disturbance of the peace, and because the counsel of the party was at London, he adjourned the assise.* Br. Adjournment, pl. 6. cites 7 H. 6. 9.

13. *In general assise, they shall be adjourned by proclamation till the next assises, and assise purchased in the mean time shall be served by the first precept, but in special assise they shall have day certain, and precept made in the mean time is void.* Br. Assise, pl. 401. cites 32 H. 6. 10.

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14. It seems that the justices may adjourn the assise *upon every demurrer, and upon every dubious plea or verdict, and upon every foreign plea, and to what place they will, and adjournment may be upon certification of assise as well as upon assise.* Br. Adjournment, pl. 29.

### (S) Taken. Where to be brought and taken.

*B. R. was held at York, and assise was taken there, and after the Bench was removed to Westminster, yet they proceeded in the assise in B. R.*

but it was taken in the county by nisi prius by reason of this statute. Br. Nisi Prius, pl. 10. cites 7 H. 4. 45.

1. 9 H. 3. cap. 12. *ASSISES of novel disseisin and mortdancestour shall be taken in their proper shires in this manner: The king or (in his absence out of the realm) the chief justices shall once a year send the other justices through every county, to take together with the knights of the shire such assises in those counties, and such things, as cannot be there determined, shall be ended elsewhere in their circuits; also difficult matters shall be referred to the justices of the Bench to be there determined,*

2. If a man be *disseised sitting an eyre in the same county, he shall have assise there without writ out of Chancery; and upon false verdict there, he shall have attain there in the same manner; for he need not have patent of assise in eyre, nor before justices at Westminster, for they have commission which serves; and so it seems that the commission in eyre ought to be also special.* Br. Assise, pl. 496. cites 6 E. 2. It. Canc.

S. P. Ibid.  
pl. 15 c.  
cites 10 Ass.  
19.

3. Assise against A. and B. in B. R. of a rent-charge; and so see that assise lies in Br. *where the land lies in the county where the Bank sits.* Br. Assise, pl. 142. cites 9 Ass. 7.

4. *In assise in the county of E. a recovery in the county of W. is no plea, by the best opinion; and yet he shewed that at another time the plaintiff upon a recovery in the county of W. of these lands against him, sued to reverse it in B. R. and had restitution there, and so affirmed the tenements to be in the county of W.* Br. Assise, pl. 159. cites 10 Ass. 25.

5. Assise



5. Assise in *B. R. in Suffolk*, and pending this the Bank is removed to *Westminster*, yet they proceeded and tried the issue by nisi prius before the justices of assise in the county of *Suffolk*, and after complaint was made to the King that this award was contrary to justice, because by the removal of the Bank the original was determined; & non allocatur, but the first award was affirmed. Quod nota. Br. Assise, pl. 222. cites \* 16 Ass. 4.

2 Inst. 25. cites S. C. and says that when a record is in B. R. it must remain there, and that the awarding

the nisi prius into Suffolk was by the advice of all the judges, and says it is a case worthy of observation how by this exposition both the party's suit was preserved, and the purview of the statute observed.

\* This should be 19, and so are the other editions.

6. In assise where lord and tenant are of land in *K. held by 10s. per ann. to be paid at K. the tenant by fine in writ of customs and services, acknowledged the land to be held by the said rent, which he used to pay at K. but that now he should pay it at H. and the assise of the rent was brought in H. and exception taken, and not allowed, and therefore the judgment was reversed by error; for the assise shall be brought in K. For nothing is changed by the fine, but the place of payment. Br. Assise, pl. 224. cites 20 Ass. 1.*

7. Assise of rent was brought in the proper county, as it ought by the statute of Magna Charta, viz. in the county of York in *B. R.* and the parties pleaded, and for difficulty had day in *tres Sept. Pasch.* and at the day the baron made default, and the same was received and pleaded, and day given to *Octab. Trin.* and at the day the parol was fine die by not coming of the justices, and re-attachment was sued die Jovis in 15 Hillarii ubicunque &c. viz. in *B. R.* and good, notwithstanding the statute; for it was first commenced in the proper county. Br. Assise, pl. 82. cites 24 E. 3. 23.

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8. Assise is not a common plea, and therefore see that assise lies not in *C. B.* which holds common pleas, unless the land be in the same county where the bank sits; for assise shall be taken in its county by the statute of Magna Charta, cap. 12. Br. Conusance, pl. 40. cites 26 Ass. 4.

9. If a carody, of which rent is parcel, be granted percipiend<sup>r</sup> in *D. in the county of E. and if it be arrear, that he shall distrain in C. in the county of H.* the assise may be brought in the county of *E.* where *D.* is; for per Thorpe, it is issuing out of the land in *D.* and the subjecting it to the distress in *C.* is only for greater surety; but if both had been in one and the same county, all had been put in view; by the reporter. Quære. Br. Assise, pl. 327. cites 31 Ass. 27.

10. 7 R. 2. cap. 10. enacts, That an assise of novel disseisin for rents issuing out of lands in divers counties, shall be taken in confinio comitatus, as is used for common pasture in one county appendant to tenements in another.

Thel. Dig. 59. lib. 7. cap. 3. S. 1. says it appears in 18 E. 2. Assise

380. and Mich. 18 E. 3. 32. and 18 Ass. 1. and 7 H. 4. 28. that by the common law a man could not have assise of rent issuing out of lands being in divers counties, for which cause a statute was made anno 7 R. 2. cap. 10.

If a man has rent in 3 or 4 counties, it seems that he that is disseised may have several assises to be taken in confinio comitatum; for the letter of the statute of 7 R. 2. is general of rent due of tenements in divers counties, and though it has a reference to the case of common of pasture &c. yet inasmuch

asmuch as in the case of common of pasture, if the land *in* which &c. lies in several counties, and the land *to* which lies in another county, there shall be so many writs as counties; whence it follows that he that has rent issuing out of lands in several counties, shall have such remedy; and the case of common was put exempli gratia only, and by way of similitude; and the stat. 7 R. was made to satisfy a doubt on Magna Charta, cap. 12. that assises of novel disseisin and mortdancerfor shall be taken only in their proper counties; and some held that this was not observed when the justices sat in confinio comitatus, and particularly when there are 20 counties mesne between the 2 counties, as the book is in 5 E. 4. 2. b. But this doubt might be conceived also upon the said assise of common, when the land in which &c. is in one county, and the land to which &c. is in another county, which case without question is not restrained by the said statute; for assise of common of pasture lay at common law, as appears by stat. of West. 2. cap. 29. [25] 7 Rep. 3. b. 4. a. Mich. 26 & 27 Eliz. in Bulwer's Case.

11. Thel. Dig. 60. lib. 7. cap. 3. f. 2. says See in the Register, fol. 197 and 198. and in the new Nat. Brev. fol. 180 and 183. the form of writs of assise of common of pasture, and of nuisance to be brought in confinio comitat' where the common in one county is appendant to the land in another, and the nuisance is done in one county to the franktenement in another county.

12. Where the franktenement is in one county, and the way appendant in another, assise of nuisance shall be in confinio comitatus; and so of common, and the view shall be made of the one land and the other. Br. Nuisance, pl. 9. cites 11 H. 4. 25.

Where it is granted in 2 counties which do not join,

there assise does not lie; for it is not in confinio comitatus. Ibid.

13. If office is granted in two counties, and he is disseised in the one, assise shall be in confinio comitatus; per Pole. Br. Assise, pl. 76. cites 22 H. 6. 9, 10.

If rent be issuing out of 2 manors [195] in 2 counties, he shall

have 2 assises, in each county one, and one joint patent, and the justices may sit between the 2 counties, though there are 10 counties between them. Br. Assise, pl. 389. cites 5 E. 4. 2. Co. Litt. 154. a. cites S. C. Thel. Dig. 60. lib. 7. cap. 3. f. 5. cites S. C.

14. If a man grants 20l. rent in all his land, and the party brings assise in Middlesex, and surmises that the grantor had land in the counties of Middlesex, Kent, and Sussex, the writ shall abate; per Cur. Br. Assise, pl. 76. cites 22 H. 6. 9, 10.

S. P. and ought also to mention how they are adjoined. Thel. Dig. 60. lib. 7. cap. 3. f. 4. cites S. C.

15. In assise in confinio comitatus, the writ shall make mention that the land stretched into both counties; per Moile. Br. Count, pl. 20. cites 35 H. 6. 30.

16. Note, that all assises of novel disseisin and of mortdancerfor, which are in the county where the common bank is, shall be returned in the same common bank, and where B. R. is in another county than C. B. is, then all the assises of novel disseisin and mortdancerfor, which shall be taken of land in those counties, shall be taken in the same bank [returnable into B. R.]. Br. Assise, pl. 486. cites the Register, 196.

Mo. 90. pl. 223. Playre v. Crouch, S. C. And. 14. pl. 31. S. C. Bendl, 189. pl. 219. S. C. Kelw. 212. pl. 22. S. C. and though the issue was found for the

17. Assise must be brought in the county where the land lies, and not elsewhere; and being brought in a foreign county, though by the assent of the parties, it is erroneous. D. 283. b. 284. a. pl. 32. Pasch. 11 Eliz. Butler v. Crouch.

the

the plaintiff, and the matter of law was with him, yet because the issue was tried by a foreign county, where it ought to be tried per patriam, it was not good, nor remedied by any statute of Jeofails, and the Court would not give judgment.

(T) One or several Affises. In what Cases.

1. **A**SSISE *de libero tenemento*, and the *plaint of estovers apprehender* in 100 acres of wood, for burning, building, and inclosure to 2 houses, and for inclosure to 2 oxgangs of land, without view of the forester, and ablest' blefts in 1000 acres of moor to cover the house, and for burning in the same house; and the *plaint was challenged, because he made plaint of 2 several estovers in divers places*, and that blefter blefts cannot be said estovers, but common of turbary; judgment of the plaint. Herle awarded the plaint good. Br. Affise, pl. 127. cites 7 Aff. \* 18.

S. P. Ibid. pl. 168. cites 11 Aff. 13.

\* This is misprinted, and should be pl. 17.

2. And said that affise lies well of 100 acres of land, and of a *corody*. Ibid.

3. And affise lies of 4 acres of willows and reasonable estovers, and yet one is by the common law, and the other by the statute. Ibid. cites 10 E. 3.

Br. Affise, pl. 168. cites 11 Aff. 13. S. P.

4. And one affise lies of two rents, and one plaint. Ibid. cites M. 11 E. 3.

5. Affise was of 42s. rent, where the tenant said that 40s. issued out of 30 acres in C. and 2s. rent is issuing out of 4 acres of meadow in C. and each by itself in gross, judgment of the plaint, and the plaint awarded good; and as to the 40s. the tenant said, that the plaintiff is seised at his will, and as to the 2s. he said, that the 4 acres of meadow is furrounded by the waters of Trent, and so he is not tenant &c. Br. Affise, pl. 168. cites 11 Aff. 13.

6. In one and the same plaint may be *divers franktenements*. Br. Affise, pl. 173. cites 11 Aff. 22.

7. If a man grants 20s. rent out of his manor, scilicet 10s. by the bands of J. and 10s. by the bands of W. yet one and the same affise lies, and the intire manor is charged. Br. Affise, pl. 476. cites [ 196 ] 15 Aff. 11. and Fitzh. Charge 6.

8. If two tenants in common are disseised, each shall have a several affise for his moiety &c. because they are seised by several titles; but if 20 jointenants are disseised, they shall have but one affise in all their names, because they have but one joint title; so if there are 3 jointenants, and one of them releases all his right to one of his companions, and then the other 2 are disseised of the whole, they shall have but one affise in both their names for the 2 parts, because they held jointly at the time of the disseisin; and as to the 3d part, he to whom the release was given shall have an affise in his own name, because of that part he is tenant in common. Litt. S. 311, 312.

## (U) Attachment in Assise.

1. *NOT* attached by 15 days is no plea in assise in B. R. without answering over; contra before justices assigned. Br. Attachment, pl. 5. cites 11 Aff. 30. and 12 Aff. 4.

2. In ancient assise, which at no time before was attached, the defendant said that *not attached by 15 days*, and non allocatur; but the assise was taken because it was an *ancient assise*, quod nota. Br. Attachment, pl. 8. cites 28 Aff. 43.

3. If *not attached by 15 days* be found against the tenant, by examination of the bailiff, it is not peremptory; contra if it be found against him by the assise, quod nota, diversity. Br. Assise, pl. 463. cites 6 R. 2. and Fitzh. Assise, 462.

4. In assise, the tenant pleaded *not attached by 15 days*, and gave in evidence that it was made by *J. B. who had no warrant from the sheriff, nor from his ministers* to do it, for it is void without warrant; but it seems that warrant by parol is sufficient. Br. Attachment, pl. 15. cites 8 H. 4. 7.

5. Assise against baron and feme, the sheriff returned that the baron is attached by 100 ewes, and that the feme nihil habet in balliva mea per quod &c. *Nec est inventa* in eadem; and by the best opinion the return is not good; for a feme shall be attached by goods of the baron; for the writ willed that he attach the feme, which the law will not command, if it be impossible; but it is possible, for she may be attached by the goods of the baron, for she is amenable by him. Br. Attachment, pl. 4. cites 7 H. 6. 9.

6. In assise, the tenant pleaded *not attached by 15 days*, the plaintiff said, that his servant made the attachment, who is not there; by which new attachment was awarded, without taking the assise to enquire of it, for it was the folly of the plaintiff who had not brought his servant. But e contra if the bailiff errant had done it, and absented himself, there the assise shall enquire of it; but if the servant had been present, he shall be examined whether he had warrant from the sheriff or not; quod nota diversity of the trial of it. Br. Assise, pl. 462. cites 26 H. 6. and Fitzh. Assise, 461.

In assise, the tenant pleaded, not attached by 15 days, the bailiff was examined, who said

7. Attachment in assise shall be made 15 days before the day of assise, and after the day of assise; and shall not be by a glebe of land, but by an ox or by pledges, and because not, therefore ill, per Cur. for the tenant said, not attached &c. Br. Assise, pl. 398. cites 27 H. 6. 2. and Fitzh. Assise, 14.

[ 197 ] that he attached him by the horse of the farmer, who was a termor to the tenant of the land in plaint, which matter was recorded; and it seems that it is no good attachment, for the tenant cannot forfeit the beasts of his farmer. And attachment ought to be made of such things as the tenant may forfeit by outlawry; nota between Dudley and Leveson, for the manor of Parton in the county of Stafford. Br. Assise, pl. 480. cites 31 H. 8.

## (W) Return

(W) Return in Affise by the Sheriff. How.

1. **I**N affise, the sheriff returned at the first day that the jury were put to mainprise, and because they were not summoned at the first day, Herle would not take the affise, for they ought to be summoned at the first day, and not to be put to the mainprise the first day, note a diversity. Br. Affise, pl. 124. cites 7 Aff. 15.

2. In affise, the sheriff returned *quod defendens non est inventus & nihil habet unde &c.* the affise shall be taken; quod nota, per Cur. Br. Affise, pl. 422. cites 7 E. 3. 57. and Fitzh. Affise, 135.

(X) Abatement of the Writ. By what.

1. **W**HERE the entire rent-service is 10s. and the lord is paid 8s. and disseised of 2s. he shall not have affise of the 2s. but of the whole. Thel. Dig. 148. lib. 11. cap. 35. f. 7. cites 8 E. 2. It. Canc. Affise, 387.

2. If the heir brings affise, and pending the writ a nearer heir is born, the affise shall abate; quod nota. Br. Affise, pl. 164. cites 15 E. 2.

3. Affise of a rent-charge against Roger D. and the manor of D. was put in view, and deed shewn, by which P. father of Roger, had granted 20s. rent extra unam bovatom terræ, to be taken by the hands of the tenant of the same land; and that if it happened that the land was aliened, sold, or come to the lord by escheat, or by any other way the rent shall be stopped, that he may distrain in the manor of D. and that the oxgange of land was aliened, and the rent arrear, and yet the writ was abated, because the tenant of the oxgange of land charged was not named. Br. Affise, pl. 105. cites 1 Aff. 10.

4. The verdict shall abate the writ if the plea of the tenant be found that the land is in another vill. Br. Affise, pl. 107. cites 1 Aff. 17.

5. Coparceners of a meadow, one cuts the grafs and carries away 4 parts in 5 of the hay, leaving the 5th part, the other coparcener refused to meddle with the 5th part, but let it remain on the land, and brought affise, and it was held, that this taking more of the profits than belonged to the one coparcener was a disseisin of the other; but if the other coparcener had taken the 5th part, it had abated her writ. Br. Affise, pl. 121. cites 7 Aff. 10. per Herle.

6. Affise of the manor of T. except 100s. rent, and the writ was de libero tenemento in T. and one as tenant of parcel said, that the manor extended into T. and C. Judgment of the writ, and if &c. nul tort, and the plaintiff said, that this which was in C. was the 100s. rent in the exception, and upon this the writ awarded good, and yet by some the exception cannot extend but to the vill  
in

in the writ, which Bacon denied. Br. Assise, pl. 128. cites 7 Ass. 20.

[ 198 ] 7. Where a *feme sole* was disseised, and took baron, and brought assise, and the writ was quod disseisvit eam, and the writ awarded good, and the plaintiff recovered. Br. Assise, pl. 126. cites 7 Ass. 17.

8. Assise of rent by baron and feme, quod disseisvit eam, and the rescous was found before the coverture, and therefore the writ good; but if it had been after, then it ought to be quod disseisvit eos, although the baron had not been seised, for seisin of the feme is seisin for him, and his feme to have assise. Br. Assise, pl. 131. cites 8 Ass. 4.

9. If the assise finds estate made to the plaintiff upon a condition, that if the plaintiff did not give such land to the defendant, or such like &c. that he may re-enter, yet the writ shall abate, and good reason, for this is an entry pending the writ. Br. Assise, pl. 158. cites 10 Ass. 24.

10. Assise against two, the one pleaded a release of the plaintiff of all actions, and of all the right, and the assise was prayed, because he who pleaded did not take the tenancy upon him, for if he does not do it the assise shall be awarded, and after the other took the tenancy, and pleaded in bar the same deed as assignee of the first who pleaded &c. and the deed was denied &c. and if the plaintiff had confessed the deed in the hands of him who first pleaded, the writ had abated against all. Br. Assise, pl. 166. cites 11 Ass. 9.

11. If the plaintiff had confessed that any named in the writ is not disseisor, or that it may be found by record that any named in the writ was at another time acquitted, a disseisor may plead such matter, and the tenant shall answer also, and if they are at issue the plea of the disseisor shall be first tried, and if it be found, it shall abate all the writ. Br. Assise, pl. 166. cites 11 Ass. 9.

12. Assise against the baron and feme and others, the sheriff returned that the baron is dead, and per Cur. the writ shall not abate but against the feme, and shall be good against the others if they are disseisors, and the tenant named in the writ; but it seems, if the baron had been dead before the writ purchased, then the writ shall abate in all. Br. Assise, pl. 170. cites 11 Ass. 15.

13. Where a manor extends into two vills, and assise of rent out of the manor is brought in the one vill, it is a good plea to the writ that the manor extends into the other vill, and it is a good replication that this which is in the other vill is not but services; for the demesnes only shall be charged with the rent-charge; quod nota. Br. Assise, pl. 184. cites 12 Ass. 40.

14. In assise, the tenant pleaded nul tort, and the seisin and disseisin is found by verdict, and that the plaintiff brought his writ as prebendary not named prebendary, by which the writ was abated by award. Br. Assise, pl. 472. cites 13 E. 3. and Fitzh. Brief 675.

15. In assise, if the plaintiff grants to the tenant by indenture that he shall hold the land till such a day &c. the writ shall abate. Thel. Dig. 187. lib. 12. cap. 20. f. 1. cites Hill. 13 E. 3. Brief 28. and

42 Aff. 21. and says, see 10 Aff. 24. and 10 E. 3. 522. accordingly.

16. In assise the tenant *pleaded jointenancy to parcel*, and the plaintiff *confessed it*, by which it abated of this parcel. Per Per-  
vick, *if there be no other disseisor than him*, all the writ shall  
abate. Br. Assise, pl. 191. cites 14 Aff. 8.

In assise the  
tenant  
pleaded a  
bar to part,  
and jointen-  
ancy by

*deed with a stranger of the rest*, and the plaintiff *confessed for the jointenancy*, and prayed to have the  
assise of the rest, and had it; and so the assise *abated in part*, and awarded for the rest; and this he  
did because the assise shall not be staid by the jointenancy; for *assise shall not be taken by parcels*. Br.  
Assise, pl. 223. cites 19 Aff. 14. and 21 Aff. 21. and 22 Aff. 6. accordingly.

17. *Recovery by a stranger by another writ pending the assise*,  
shall not abate the writ of assise. Br. Assise, pl. 471. cites 14  
E. 3. and Fitzh. Brief, 388.

18. In assise of common of pasture the *plaint was of a common* [ 199 ]  
*in grofs in such place, with all the beasts, at all times of the year, and*  
*the specialty which was shewn forth proved it rather common ap-*  
*pendant*, by which the writ abated by award. Br. Assise, pl. 199.  
cites 15 Aff. 5.

19. *Jointenancy by deed was pleaded with a stranger*. The  
plaintiff *would have confessed, and avoided it by feoffment of his vil-*  
*lein, and that he entered and was seised until &c. and was not suf-*  
*fered in the absence of the other jointenant*, by which the writ was  
abated. Br. Assise, pl. 201. cites 15 Aff. 13.—Ibid. cites  
32 E. 3. contra.

20. Assise *between 2 abbots, and found for the plaintiff*, and there-  
fore it was *enquired of the right, by reason of the collusion for mort-*  
*main*, and they found therein *matter which goes to the abatement of*  
*the writ*, and yet the writ did not abate, because this *is not but*  
*inquest of office in this matter*, and therefore the plaintiff recovered.  
Br. Assise, pl. 203. cites 16 Aff. 1.

21. A *disseisor shall not plead a recovery in abatement* of the writ,  
*neither by conclusion nor misnomer, nor otherwise, without shewing*  
*the record immediately*; for he cannot lose the land by failure of  
record, as the tenant may, therefore the assise was *awarded im-*  
*mediately*. Quod nota. Br. Assise, pl. 413. cites Pasch. 20 E. 3.  
and Fitzh. Assise, 120.

22. In assise a *clause was in the original, which was not in the*  
*patent, and several were named in the original which were not in*  
*the patent*, and therefore the writ was abated. Br. Assise, pl. 238.  
cites 22 Aff. 20.

23. Assise *de libero tenemento in villa de Westm.* was held good,  
notwithstanding that it was said that *villa* ought to be omitted.  
Thel. Dig. 96. lib. 10. cap. 7. f. 8. cites 24 Aff. 2.

24. Writ of assise *against Ro. and Cath. his feme, and Will. B.*  
*was pone per Vad. &c. prædict. Ro. Cath. & Will.* without putting  
any (&) between Rob. and Cath. and yet adjudged good. Thel.  
Dig. 90. lib. 10. cap. 6. f. 32. cites Trin. 26 E. 3. 61. and 23  
Aff. 18.

25. In assise the *defendant pleaded to the assise, which said that*  
*the plaintiff was seised and disseised, but no disseisor was named in the*  
VOL. III. writ,

writ, and therefore it is awarded that the writ shall abate; and yet the assise was *against baron and feme*, who *pleaded a record*, and *failed* of it at the day; and the *feme* was *received*, and *pleaded nul tort*, and the verdict found ut supra, by which failure the baron is a disseisor by the statute, and yet judgment ut supra; and therefore it seems that the receipt of the feme saved the baron; quære the reason; and so writ abated by verdict of a thing not pleaded. Br. Assise, pl. 266. cites 26 Ass. 35.

26. If a man brings assise in *confinio comitatus*, the writ shall make mention that the land extended into both counties, and how they are adjoining. Br. Assise, pl. 15. cites 35 H. 6. 30. per Moile.

27. Assise against A. and 3 others, and A. said that the 3 were dead before the writ purchased, and found accordingly, and that A. disseised the plaintiff, and that A. was tenant, and therefore the plaintiff recovered by award; quod mirum, upon a false writ. Br. Assise, pl. 269. cites 26 Ass. 63.

28. In assise against 2 jointenants, the one dies pending the writ, the writ shall abate. Br. Assise, pl. 273. cites 27 Ass. 45.

And if the  
tenant in-  
froffs one of  
the dissei-  
sors, and dies  
pending the writ,

29. But if one disseisor dies, and another is named tenant, all the writ shall abate. Br. Assise, pl. 273. cites 27 Ass. 45.

yet the writ is good; per Wilby. Quære. Ibid.

Br. Assise,  
pl. 273.  
cites S. C.  
& S. P. but  
Brooke says,  
that it seems

30. Assise against the baron and feme as disseisors, and the 3d as tenant; the baron died, the writ shall abate. Br. Assise, pl. 474. cites 27 Ass. 45. and Fitzh. Brief, 883.

[ 200 ] *Assise against the baron and feme, and A. and it is found that A. is tenant, and the baron and feme not, but that the baron is dead, and there is no other disseisor named in the writ but the feme; for the baron and feme were disseisors, and the opinion of the Court was that the writ shall abate; for the feme has now lost the name of the Feme, and in assise there ought to be a disseisor and tenant. Quod nota.* Br. Assise, pl. 287. cites 28 Ass. 37.

Thel. Dig.  
188. lib. 12.  
cap. 23. f.  
1. cites S. C.  
and Mich.

31. The lord distrained for rent, pending assise of the same rent, the assise shall abate, quod nota; for distress is in law as an entry into the rent, as it seems. Br. Assise, pl. 302. cites 29 Ass. 52.

13 E. 3. Brief 115. S. P. accordingly.—But an assise of rent shall not abate by distress taken for the rent pending the writ by the bailiff of the plaintiff, if the plaintiff does not know of it, and does not agree to the taking. Thel. Dig. 188. lib. 12. f. 1. cites Mich. 20 E. 2. Brief, 397.

In assise of rent, notwithstanding the plaintiff distrained for the homage of the tenant, yet the writ shall not abate. Thel. Dig. 188. lib. 12. cap. 23. f. 3. cites Mich. 47 E. 3. 7.

32. Assise by Agnes D. the defendant said that J. her baron is alive, judgment &c. [it being] brought by the feme without her baron, and the assise was awarded, therefore it seems that this exception goes to the writ, so that he shall plead over &c. Br. Assise, pl. 312. cites 30 Ass. 26.

\* S. P. but  
if he uses it  
of his own  
free will,  
the writ  
shall abate.  
Thel. Dig.

33. Assise of common of pasture in grofs; P. answered as tenant, and demanded what he has of the common, the plaintiff prescribed in him and his predecessors time out of mind. Persey said, never seized of the common as in grofs, and if &c. seized as appendant at will &c. Another defendant said, that the plaintiff had used the common pending the



*the writ*; per Birton, if his beafts go thither by \* escape, and not of his own will, the writ shall not abate; wherefore the assise was taken. Br. Assise, pl. 334. cites 33 Aff. 9.

188. lib. 72.  
cap. 24. f. 1.  
cites 33. Aff.  
22. [but  
there are

not so many pleas in that year, and so misprinted, and it should be pl. 9.]

34. In assise, the tenant *pleaded nul tort*, and the *seisin and disseisin was found*, and that the tenant held jointly with A. who is alive not named, by which the writ was abated by award, quod nota, and yet contra anno 9. and per Prisot, anno 33 H. 6. 30. Br. Assise, pl. 446. cites 33 E. 3. and Fitzh. Assise, 457.

35. Assise by a chaplain of a chantery of rent, the tenant *pleaded hors de son fee*, the plaintiff said that he and his predecessors chaplains &c. were seised time out of mind, and he was seised and disseised &c. and the other traversed the prescription, and the issue found for the plaintiff, and that he distrained, and rescous was made, and that the plaintiff had no other seisin than the distress, and prayed the discretion of the justices, and the plaintiff recovered by award; because by the seisin, the predecessor of the chantery was seised, and not out of possession, and also by the counter plea of the tenant it is a disseisin, and therefore the plaintiff recovered his damages. It was said that if the defendant had pleaded to the assise, the writ had been abated by this verdict; because there was no disseisor to the plaintiff. Br. Assise, pl. 335. cites 34 Aff. 3.

36. Assise against A. it is found that A. and E. his feme (which feme is not named in the writ) entered in jure uxoris, and found that the feme had nothing; nor any interest in it, and yet the writ was abated by not naming of the feme; the reason seems to be in as much as the feme cannot wave her interest gained by the disseisin during the life of the baron. Br. Assise, pl. 346. cites 33 Aff. 5.

37. In assise, it was found by verdict that 2 coparceners of a moore made purparty, and one leased his part to A. B. for life, who leased his part to 3 at will, who pastured the soil of the other coparcener, and cut wood, and mowed rushes, and the other parcener voided the possession, and brought assise against lessee for life, and against two tenants at will; one of the tenants at will is not named, who by his act is a disseisor and tenant with the others, therefore by award the plaintiff took nothing by his writ. Br. Assise, pl. 345. cites 37 Aff. 8.

38. If it be alleged in assise that the tenements are in the hands of the King, the escheator shall be thereof examined if he be present, and if not, the assise shall enquire it, per Finch: and if the tenant infeoffs the King pending the writ, yet the writ is good. Br. Assise, pl. 349. cites 38 Aff. 16.

39. Assise against several, it was found that one named in the writ was tenant, but that there was not any disseisor named in the writ, by which the writ was abated, and therefore quære, if it be a good plea that there is no disseisor named in the writ; and &c. Nul tort &c. Br. Assise, pl. 375. cites 46 Aff. 10.

40. If assise is brought of land, part in guildable and part in

But where  
40. If

it is brought *franchise*, which has conufance of pleas, the writ shall abate ; as above, *where the lord of the franchise has only returna brevium*, the writ shall not abate ; for the sheriff may serve the writ for the guildable, and the bailiff of the franchise for the land in franchise, and so in the one cafe there shall be two writs, and in the other only one. Br. Conufance, pl. 15. cites 8 H. 4. 7. per Gaſcoign and Hull.

41. In affiſe againſt diverſe where 2 take the entire tenancy, and plead to the writ, if the plaintiff ſhews that one of them is tenant and that the other has nothing, he who is tenant ſhall not plead de novo as ſole tenant. Thel. Dig. 90 lib. 10. cap. 1. f. 34. cites 21 H. 6. 63.

Br. Brief, pl. 21. cites S. C.— Thel. Dig. 90. lib. 10. cap. 6. f. 16. cites S. C. and Mich. 26 H. 6. Brief 105.

42. In affiſe the writ was, et interim fac. 12 &c. *videre tementa ill. & ſum. eos quod ſint coram prefat. juſticiar. &c. Et pone per vad. & ſal. pleg. prædictum W. vel ballivum ſuum &c. ſi &c. Quod ſit ibi audiend. ill. recogn. &c.* and becauſe it ought to be quod tunc ſit ibi, and this word (*tunc*) was wanting, the affiſe was adjourned, and they were clear in opinion to abate the writ, and the plaintiff was nonſuited ; quære if it ſhall not be amended ; for it is ſaid there, that it has been uſed to amend ſuch writs, and ſo they did before Sir R. Newton. Br. Affiſe, pl. 4. cites 27 H. 6. 2.

43. A plaint was brought in D. only, whereas there were 2 D.'s in the ſame county, and none without addition, yet the affiſe and plaint is good enough ; becauſe (as the reporter apprehends) the judgment in affiſe differs from other writs ; for he recovers ſeiſin of the thing put in plaint, *per viſum recognitorum*, and if the thing in the plaint be ſo certain and plain, that the recognitors may put the plaintiff in poſſeſſion, it is ſufficient. D. 84. b. pl. 84. Paſch. 7 E. 6.

S. C. cited by Crooke Juſtice. 2. Brownl. 231. — S. C. cited by Fleming Ch. J. Buſt. 9.

44. In an affiſe for a cellar, the tenant pleaded in abatement, that the demandant had entered after the laſt continuance ; the jury found that the demandant entered at the requeſt of the tenant, and only to view the antiquity thereof, and not for any other purpoſe. The Court held this no entry to abate the writ and judgment for the plaintiff. Pl. C. 91. b. Trin. 3 Mar. Panel v. Moore and the Mercers Company.

45. There were 8 in an affiſe: the defendant as to 7 of them pleads non diſſeiſuit ; the recognitors as to theſe 7 found that there was no diſſeiſin, but found a diſſeiſin as to the 8th ; the writ ſhall abate ; for the plaintiff has joined thoſe as plaintiffs in the affiſe who ought not to be joined. Jenk. 42. pl. 79.

The reporter makes a quære how this can be, for the jury found that he was ſeiſed & ill by B. diſſeiſed, which is the ſame thing as finding that B. was diſſeiſor and tenant ; for it being of tiſhes, which are in pernaney, he

46. Error of a judgment in affiſe ; affiſe was brought againſt A. and B. of a portion of tiſhes ariſing out of 300 acres of land in S.—A. pleads no tenant of the freehold named in the writ, and if &c. Nul. tort. B. pleaded nul tort ; all the Court held, that of neceſſity there ought to be a tenant named, and the jury finding that none was named, the writ ought to abate, and therefore the judgment was reverſed. Cro. E. 559. pl. 16. Paſch. 39 Eliz. B. R. Cadogan v. Powell.

[ 202 ]

remained always tenant of them to every action, and could not diſpoſe of it as he might of the land itſelf. But that notwithſtanding, for this cauſe, judgment was reverſed.

47. Where

47. Where an assise is brought for a mill it shall be de molen-dino generally, without expressing certainly the nature of the mill, as grist-mill, fulling-mill &c. because the mill is the substance, and the thing to be demanded, and the other are but additions to shew the quality of the mill. 4 Rep. 87. a. Pasch. 43 Eliz. B. R. in Lutterel's Case.

48. The office of a park-keeper was granted in reversion to A. the demandant, and afterwards the park itself was granted to B. who entered and kept out A. after the death of the tenant for life. A. brought an assise, and had a verdict, but before judgment entered into the park, and there did hunt and kill a deer, and took a shoulder of it for his fee, and this entry was assigned for error, for that it had abated the writ, and made the judgment erroneous; but the Court held it no abatement. Bull. 4. Hill. 7 Jac. B. R. Shrewsbury (Earl) v. Rutland (Earl).

2 Brownl.  
229. the  
Earl of Rut-  
land v. the  
Earl of  
Shrewsbury,  
S. C. and by  
Crooke J.  
this is no  
such entry  
to abate the  
writ, it being  
to another

purpose, viz. to hunt, whereas it should have been alleged that he entered to keep; for in every entry the intent of the entry is to be regarded, and Fleming Ch. J. accordingly, and that as to the taking a shoulder for his fee it is not material, for he shewed no warrant he had to kill the buck; besides, the taking of the fee is no entering into the office, but the exercising of it; and the whole Court held this no abatement. — 8 Rep. 55. S. C. but I do not observe S. P. there.

49. In assise, if the tenant pleads in abatement he must likewise plead over in bar at the same time, and no imparlance shall be allowed without some good cause, because it is festinum remedium, and if there are several tenants, and any of them do not appear on the first day, the assise shall be taken by default against them. 1 Salk. 83. pl. 2. Pasch. 5 W. 3. B. R. Saveris v. Briggs.

## (Y) Election of Tenant. Where several Defen- dants take the Tenancy on themselves.

1. ASSISE against two, each took the tenancy and pleaded. The opinion of some is, that the plaintiff in this case shall choose his tenant at his own peril, and this shall be first enquired, and if he be tenant he shall have his plea, and if not the writ shall abate; and by others, though he chooses his tenant, and another is found tenant, yet the writ is good, which does not seem to be law, for the election of the tenant is material. Br. Assise, pl. 129. cites 8 Ass. 1.

2. In assise against several of rent-service, one pleaded to the assise, some of the others pleaded jointenancy in the land out of which &c. and other pleas &c. The plaintiff chose him, who pleaded to the assise, for his tenant, and that he held all the land of the plaintiff by the rent &c. and found for the plaintiff by which he recovered. Thel. Dig. 149. lib. 11. cap. 37. f. 2. cites 17 E. 3. 46. 68. 17 Ass. 10. 21. and 24 E. 3. 16. 26.

3. Where they take the tenancy severally, each of the whole, the plaintiff may choose his tenant by pernaney as well as if they had pleaded non-tenure or jointenancy; but where no sole tenancy is pleaded, nor non-tenure, nor jointenancy, but a bar, or to the assise, there

there it seems that the *plaintiff cannot nor need not to take him a tenant by pernaney*; quod nota diversity. Br. Assise, pl. 403. cites 1 H. 5. 4.

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\* S. P. Br. Assise, pl. 25. cites 44 E. 3. 23.

4. Note, by the justices in C. B. that in assise *against two*, the one took the tenancy and pleaded nul tort, and the other took the tenancy, *absque hoc* that the other any thing had, and pleaded in bar, there the plaintiff shall be compelled to chuse his tenant at his peril, as well as if both had pleaded in bar and accepted the tenancy severally; quod nota. \* And if it be found that he *misselected his tenant* the writ shall abate, but he shall not be barred; and there *when the tenant [demandant] elects his tenant and pleads*, there they shall be at issue before the tenancy shall be enquired, and then the tenancy shall be first enquired, and after the other issue; quod nota, for this is contrary to ancient books. Br. Assise, pl. 384. cites || 9 E. 6.

|| Quere, for every edition of Brooke is fo.

### (Z) Election of Tenant. At what Time it may be.

1. IN assise *against two*, who severally pleaded as sole tenants of the whole, and the plaintiff replied to their pleas without choosing his tenant, upon which the assise was adjourned to Westminster, and the plaintiff was received to choose his tenant after the adjournment. Thel. Dig. 150. lib. 11. cap. 37. f. 4. cites Pasch. 22 E. 2. 5.

Br. Adjournment, pl. 19. cites S. C.

2. Assise *against several*, the one took the entire tenancy, and pleaded a recovery in bar, and another said that he is tenant by the feoffment of the first, and pleaded the same recovery in bar, and the plaintiff without choosing his tenant said, that the land recovered lies in another vill, and upon this the parties were adjourned to Westminster before the same justices, and there the plaintiff elected the last, who pleaded, for tenant, and said, that the others are only disseisors, and answered to him, and prayed to be discharged of the plea of the others; per Greene, you cannot do so, for we are adjourned upon another point, and because they were adjourned before the same justices in the same plight as they were in pais, therefore \* Thorpe awarded that he might now chuse his tenant, and adjourned the assise in pais to be taken; quod nota. Br. Assise, pl. 255. cites 23 Aff. 16.

\* This should be shurd.

### (A. a) In what Cases the Plaintiff is compellable to choose his Tenant; and the Effect of mis-electing him.

1. A. BRINGS an assise *against two*, one pleads the release of the plaintiff of all actions personal, the other pleads joint-tenancy with C. who is in full life at dale not named in the writ; in this case the plaintiff ought to elect his tenant, and if he misses his tenant in the election the writ shall abate. Jenk. 16. pl. 21. cites 17 Aff. 25.

2. In

2. In assise against two, the one pleaded to the assise by bailiff, and the other said, that he was tenant of the moiety, and pleaded in bar, the plaintiff said, that he who pleaded to the assise was tenant of the whole, and that the other was not tenant &c. and it was found that he who took the tenancy of the moiety was tenant of the moiety, and it was found for the plaintiff as to seisin and disseisin of the other moiety, upon which he had his judgment of this moiety; [ 204 ] but for the other moiety it seems by the argument of the book that the writ shall not abate, but that the plaintiff shall plead to the bar of him who was found tenant &c. yet the plaintiff was nonsuited for fear of being barred. Thel. Dig. 150. lib. 11. cap. 37. f. 3. cites 20 Ass. 4.

3. Assise against two, each pleaded in bar taking the entire tenancy, the plaintiff mis-cleeds his tenant, which is so found against him, this is peremptory, and he shall be barred by the opinion of the Court; quære thereof, and see 8 Ass. 1. that it does not go but in abatement of the writ. Br. Assise, pl. 225. cites 20 Ass. 4.

4. In assise against A. B. and C.—A. pleaded jointenancy with one not named &c. The plaintiff said that B. was tenant, absque hoc that A. anything had &c. and it was found that A. and B. had nothing, but C. was tenant, and the seisin and disseisin found, upon which the plaintiff had judgment to recover, in as much as there was tenant and disseisor named. Thel. Dig. 150. lib. 11. cap. 37. f. 6. cites 42 Ass. 1. and 33 H. 6. 36. and 37.

But in assise one pleaded jointenancy with his feme not named, &c. and the plaintiff said that he was not te-

nant &c. and it was held per Cur. that if it be found that he is tenant, that the writ shall abate immediately without enquiring of the jointenancy. Thel. Dig. 150. lib. 11. cap. 37. f. 7. cites Mich. 42 E. 3. Assise 116.

But see that in such case after such verdict the plaintiff was put to answer to the jointenancy, and the writ was not abated; but ill, as the reporter believes, in as much as if each of the tenants takes the entire tenancy and pleads in bar, and it be found that the plaintiff has illy chose his tenant, the writ shall abate. Thel. Dig. 150. lib. 11. cap. 37. f. 7. cites 44 E. 3. 23. 44 Ass. 32.

5. In assise against 2, the one pleaded in bar, and the other pleaded to the assise by bailiff, and the plaintiff said that he who pleaded in bar was not tenant, and he who had pleaded by bailiff, came in proper person, and was ready to plead in bar; upon which the assise was taken, and found that he who had pleaded to the assise was tenant, and further the seisin and disseisin, upon which the plaintiff recovered, without admitting him who was found tenant to plead in bar. Thel. Dig. 150. lib. 11. cap. 37. f. 8. cites Hill. 48 E. 3. [7] Ass. 64.

6. In assise against infant and another, each took the entire tenancy, and pleaded in bar, and the plaintiff chose the infant for his tenant, and made title to his bar, and issue was taken upon the title, and the assise charged first found that the infant was tenant, and found the title of the plaintiff, and the seisin and disseisin, and that the other had disseised the plaintiff to the use of the infant when the infant was of the age of a year and a half &c. upon which the plaintiff had judgment to recover; but writ of error was sued. Quære. Thel. Dig. 150. lib. 11, cap. 37. f. 9. cites Hill. 3 H. 4. 16.

7. It was said that in assise against 6, if 2 take the entire tenancy and plead in bar, and the others do in the same manner severally, and

the plaintiff chooses one of them to be his tenant, and it be found that all the 6 are jointenants &c. the plaintiff shall be barred by the mis-election of the tenant. Thel. Dig. 150. lib. 11. cap. 37. f. 9. cites Hill. 3 H. 4. 16. and says, see 33 H. 6. 36.

8. In assise against 3, the one pleaded to the assise, and the other 2 a release of actions personal in bar. The plaintiff said that he was seised, and disseised by those 3, to the use of him who pleaded to the assise, and if any feoffment be, it is to defraud him of his tenant, and that the first who pleaded took the profits on the day &c. and the 2 demurred, by which the writ abated by judgment; quod nota; and yet the statute extends as well to jointenancy as to non-tenure by the equity, which is intended to maintain the writ against a pernor, where the tenant of the franktenement is not named; but where the tenant of the franktenement is named, and will plead, the plaintiff shall answer to him; for he has a tenant of the franktenement, and so out of the case of the statute; quod nota, nevertheless it seems that the reason is, because a disseisor or pernor may well plead a release of actions personal, as appears in 35 H. 6. and also the plaintiff was not compelled to choose any for his tenant, causa qua supra. Br. Assise, pl. 403. cites 1 H. 5. 4.

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9. For it is not like to the case in 21 H. 6. viz. Assise against 3, the one took the tenancy and pleaded in bar, and the other 2 took the tenancy, absque hoc that the first who pleaded had anything, and pleaded ancient demesne. The plaintiff said that he was seised till by all 3 disseised to the use of one of the 2, who pleaded ancient demesne, who has made a feoffment to persons unknown, and took the profits; and to the plea of the other, and the first, no law &c. by which the pernor would have taken the tenancy alone, and pleaded ancient demesne ut supra, and was ousted by award, and the assise awarded; for here he was compelled to choose his tenant; but contra supra in the first case. And so see that where they take the tenancy severally, each of the entire, the plaintiff may choose his tenant by pernanacy as well as if they had pleaded non-tenure or jointenancy. But where no sole tenancy is pleaded, nor non-tenure, nor jointenancy, but a bar, or to the assise, as in the first case, there it seems that the plaintiff cannot, nor need he to take him a tenant by pernanace. Quod nota diversity. Br. Assise, pl. 403. cites 1 H. 5. 4.

10. In assise against 2, the one pleaded in bar a tenant, and the other pleaded no tenant of the franktenement named in the writ &c. and the plaintiff made title to the bar, and thereupon to issue, and it was found for the plaintiff, and that both were jointenants the day of the writ &c. upon which the plaintiff had judgment to recover, notwithstanding that he had made title to the bar, as accepting him who had pleaded in bar to be sole tenant of the whole. Thel. Dig. 150. lib. 11. cap. 35. f. 11. cites Mich. 33 H. 6. 35. inasmuch as the assise was not charged to enquire of the jointenancy.

11. And it was said there, that if the assise had found that he who pleaded in bar was not tenant, but the other, yet the writ had been good if there had been tenant and disseisor named. Thel. Dig. 150. lib. 11. cap. 35. f. 11. cites Mich. 33 H. 6. 35. and says it was held there, fol. 36. that if one be compelled to choose his tenant, and it be found that he has mistook his tenant, and

and that he had not made title to bar him who is found tenant &c. it shall be a bar against him. But *where the disseisor pleads, and the tenant to the affise and the plaintiff make title against the disseisor, this is only surplusage*, and shall not grieve, because he was not compelled to take him for his tenant; for *a man shall not be compelled to choose his tenant, but where the tenants severally take the entire tenancy, and plead in bar, or to the writ, or such like &c.*

12. If it be found that the *plaintiff mis-elects his tenant*, the writ shall abate, but he shall not be barred. Br. Affise, pl. 384. cites 9 E. 6.

## (B. a) Declaration. In General.

1. **I**N affise the plaint shall not abate for *want of form*, as writ shall do; but it suffices *if it has matter sufficient*. Quod nota. Br. Plaint, pl. 4. cites 22 H. 6. 10. per tot. Cur.

A man need not use such order and certainty in the plaint

of an affise *as in other writs of præcipe quod reddat*. D. 84. b. pl. 83. Pasch. 7 E. 6. says that this is common learning in the book of affises in divers places; and that in 8 Aff. wood was put *before pasture* in a plaint, and so a plaint was *de annuo redditu unius robe vel 20s. in the dis-junctive*, which could not be good in a præcipe quod reddat, and *de quadam pecia terra*; and this is good in affise without any certainty of the content. [ 206 ]

## (C. a) Declaration and Plaint in Affise. Certainty therein.

1. **A**N affise *de uno tenemento* is not good for the uncertainty. Arg. Sty. 77. cites 4 E. 2. Fitzh. Affise 451.

2. A plaint was maintained *for profit appender for the exercise of the office only*. Thel. Dig. 67. lib. 8. cap. 5. f. 5. cites 3 E. 3. Ilin. North. Affise 175. and 12 Aff. 23. *of eatables and drinkables*, as pertaining to an office.

3. Affise *by master of an hospital of 14 boufes*, and the one was the hospital; and it was said that he cannot have other plaint of a hospital, nor of a chapel, but *by name of a messuage*. Br. Plaint, pl. 20. cites 8 Aff. 29.

4. In affise of an office the plaint was *of the serjeanty of the Common Bench only*, which was *parcel of the usbery of the Exchequer*, and not of all the office &c. because every parcel of an office may be franktenement. Thel. Dig. 67. lib. 8. cap. 5. f. 4. cites Hill. 8 E. 3. 384. 8 Aff. 7.

And if a man be disseised of all his office, he shall make his plaint of all the office; but if

he be disseised only of *parcel of the profits*, the plaint shall be of this parcel of the profits taken for the execution of such an office. Thel. Dig. 67. lib. 8. cap. 5. f. 4. cites Hill. 13 E. 3. plaint 23. and cites 22 H. 6. 11. agreeing. But cites 1 E. 2. Aff. 387. contra, where it is said that a man shall not have affise of the appendant, if he be not seised of the principal; and the plaint of an office *with the appurtenances* was adjudged, *without making mention of the profits to be taken pro executione &c.* 30 Aff. 4. and that so agrees Mich. 8 E. 4. 27. and Brief, 5 E. 4. 3. but says, see that the plaint was made of the office, and of the exercise and of the profits of the office. Hill. 16 E. 2. Affise 370.

5. In affise by J. against R. and made the *plaint of 100s. rent*  
by

by the year, and of the rent of a robe by the year or 30s. and of the rent of a seal by the year or 13s. and it was challenged, because it was not certain of the one or of the other, as in præcipe quod reddat, or in writ of annuity, as appears anno 11 E. 3. and the plaint was awarded good; for it agrees with the deed upon which it is founded. Br. Plaint, pl. 12. cites 11 Aff. 8.

6. In assise the plaint was of 4 acres of willows, and did not say of land nor meadow, and well. Br. Plaint, pl. 29. cites 11 Aff. 13.

\* This is misprinted, and should be 14 Aff.

15. where it

is cited in a nota at the end of the pl. as Mich. 14 E. 3. Bayliff 6.

7. Assise, quod eum disseisivit of certain acres, the plaint was abated, because it was not in demesne. Br. Plaint, pl. 30. cites \*14 Aff. 16.

In assise of rentcharge, the plaint was of 4 marks rent cum perti-

nentiis, and so see that he shall say cum pertinentiis as well of rent-charge as of rent-service. Br. Plaint, pl. 3. cites 8 H. 6. 11. — Br. Assise, pl. 69. cites S. C.

8. In assise of rent it was said, that the plaint is not good if it be of rent-service if he does not say cum pertinentiis; quod nota; by which he said of 8s. rent cum pertinentiis. Br. Plaint, pl. 13. cites 15 Aff. 4.

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9. It is said, that in London it is usual to say what year and day the disseisin was done; contra in other assise; for in mixed actions or real actions the year and day is not used to be put. Contra in personal actions. Br. Assise, pl. 228. cites 20 Aff. 16.

10. In assise the plaint was of a mill, and did not say a wind-mill or water-mill, and yet well; quod nota ibidem. Br. Plaint, pl. 14. cites 21 Aff. 23.

S. P. Br. Assise, pl. 108. cites 2 Aff. 4.]

11. Assise of rent, the plaintiff must shew the Court what rent it is before the assise shall be awarded, be it upon plea of the tenant or by default, or by bailiff, or otherwise, by reason that the assise shall enquire of the cause of the disseisin, which cannot be if they do not know what rent is put in plaint. Br. Assise, pl. 261. cites 26 Aff. 6.

Br. Assise, pl. 308. (307) cites S. C. but mentions it to be 40s. to be taken per annum. — S. C. cited 8 Rep.

12. Assise of plaint of the office of mower of the manor of P. cum pertinentiis, and the specialty was, that the office of mower was granted for term of life, taking so many quarters of corn &c. Fisher demanded judgment of the plaint, for mower is the charge, and the grain is the profit, and so the plaint ought to have been of the profit, and not of the charge, and yet the plaint awarded good; quod nota. Br. Plaint, pl. 16. cites 30 Aff. 4.

49. b. and says, Shard took a diversity between an ancient office and a new office, and that in the last case the plaintiff must shew what fee or profit is granted for the exercise thereof; because this cannot have fee or profit appurtenant to it, as an ancient office may; but otherwise of an ancient office.

Where a man is disseised of part of a corody, he shall not have assise

13. In assise, the plaint is good of a corody by name of so many loaves, so much ale, and so much flesh, and 6d. a week, and shall not be put to assise of rent of the 6d. for it may be part of the corody. Br. Plaint, pl. 18. cites 40 Aff. 12.

of the entire corody, but of this parcel only, and not by name of a corody, but of so much beer &c. Br. Assise, pl. 30. cites 30 Aff. 4.

Disseisin



*Disseisin of parcel* is not disseisin of the whole, as of *corody*, where the disseisin is of the bread, or of the beer, or of the chamber, &c. he may have assise of this parcel without bringing it of the whole corody. Br. Assise, pl. 76. cites 21 H. 6. 9. 10. per Newton, Paston and Ashton. — S. P. and if he brings Assise of the whole his writ shall abate; but if the *corody* be of 4 loaves, and he is disseised of two only, he shall plead of all the 4 loaves. 8 Rep. 50. a. cites 3 E. 3. Assise 175. by Scroope, and 22 H. 6. 9.

14. In assise, the plaintiff made his plaint of the moiety of a piece of land, containing so much in length, and so much in breadth; Tirwit said, where you make plaint of the moiety of a piece of land, you shall not say the length and breadth, by which he amended his plaint, and made it of a piece of land entire. Br. Plaint, pl. 2. cites 9 H. 4. 3.

15. In assise of office he need not express the profits of the office. The same law in assise of a corody or stewardship, he need not express them certainly, but generally *quod disseisvit eum* of the stewardship, or of the office of holding Court. Br. Assise, pl. 388. cites 5 E. 4. 2.

16. In assise of an office, the plaint shall not be of the office and of the fees and wages, for this is of one thing twice in plaint, but shall say of an office cum pertinentiis, and shall not say that the office voided by resignation, and he was admitted, but shall say that it voided and he was admitted, and if he shews cause of the voidance, it seems that he shall say that it was by death or surrender. Br. Plaint, pl. 19. cites 8 E. 4. 22.

S. C. cited per Cur. 8: Rep. 49. b. — S. P. Br. Plaint, pl. 32. cites 5 E. 4. 2.

17. In assise of the office of one of the Clerks of the Crown in Chancery, the plaintiff had a verdict, and it was moved in arrest of judgment for that no title is found, because he did not shew that there was such an office at the time of the grant; sed non allocatur; and also that he did not shew what he ought to do, nor what he should take for his labour, and yet it was held good, and it was an office of one of the Clerks of the Crown granted to 2, and yet held good. Br. Assise, pl. 95. cites 9 E. 4. 6.

18. In assise of office of parkerhip, stewardship &c. he need not shew how the office commenced; but contra of rent-charge, rent-seck, and common in gross; for these are against common right, which offices are not. Br. Assise, pl. 95. cites 9 E. 4. 6. Baggot's Case, per Brian.

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19. In assise the plaint was de officio Magistrum Ludorum Palmarum, anglice, the office of the Master of the Tennis Plays, by grant of the King for life, by force whereof he was seised of the said office with the appurtenances for his life, and the profits thereof had taken and received to his own use till by the defendants disseised. The whole Court held, that where the grant was in English, viz. of the office of the King's Tennis Plays &c. it shall have a reasonable sense, viz. the Tennis Plays for the King's household, and not only when the King himself plays in his royal person. 8 Rep. 45. b. Mich. 6 Jac. C. B.

## (D. a) Declaration and Plaint in Assise. Title therein.

1. **I**N assise the tenant *pleaded bar by his ancestor*; the plaintiff replied, that *J. his father was seised in fee, and the land was seised into the hands of the King in the time of E. 2. because his father was of the quarrel of T. Earl of Lancaster, and his father died, and this plaintiff as heir sued to the King, and obtained the land by livery, and so was he seised till by the defendant disseised, and this admitted a good title without shewing how his father came [to it, and] without [shewing any] title of right*; quod nota, by award. Br. Titles, pl. 15. cites 2 Ass. 9.

2. In assise, the plaintiff made title to a reversion by grant of the defendant, and *did not shew deed*, and therefore it was held no title, quod nota bene. Br. Title, pl. 17. cites 8 Ass. 11.

3. In assise the tenant *pleaded lease by R. his ancestor whose heir &c. to K. for term of life, who aliened in fee, by which he entered for the forfeiture as heir of his ancestor, and the plaintiff claiming as heir of A. where he was a bastard, entered &c. the plaintiff said, protestando, that he is not a bastard, & pro placito, that he brought assise against the lessee and alienee and recovered, at which time this now tenant had nothing nor ever before, and because the judgment was against a stranger which shall not bind this tenant, nor is there supposed to be elder title, of which the estate of the ancestor of the tenant shall be mesne &c. therefore per Cur. this is no title*. Br. Titles, pl. 45. cites 10 Ass. 20.

In assise of an office, the title was not set forth in the count,

and therefore it was insisted that the demandant ought to be nonsuited; but the writ being returnable that day, was ex gratia Curie adjourned to the morrow afterwards, and if the demandant did not then make a title, he must be nonsuited. 3 Mod. 273. Hill. 1 W. & M. in B. R. Savier v. Lenthall.

4. In assise of common, the plaintiff shall *not have assise without shewing the title*, and this in his plaint, quod nota bene. Br. Assise, pl. 199. cites 15 Ass. 5.

5. Assise, formedon, the tenant *pleaded acknowledgment of right by fine without warranty to one A. que estate he has, and the demandant said that the same ancestor had only for term of life, the reversion to him, and aliened in fee &c. and he within age by 6 years entered, and so was he seised &c. and it was held a good title, without shewing how the reversion was to him; for the same cause the other took, he took for his title*. Br. Titles, pl. 16. cites 16 Ass. 1.

[ 209 ] 6. In assise the tenant *pleaded bar by escheat of his tenant, and gave colour to the plaintiff, and well; the plaintiff said, that I was seised and infeoffed him, and so was he seised till disseised, and no title, per Cur. for he has not traversed the bar nor confessed and avoided it, and so it seems that it is no bar at large, quære inde*. Br. Titles, pl. 46. cites 27 Ass. 71.

7. Assise by executors, and they were in a manner *compelled to shew*

*show cause, scilicet, title in the plaint, and so they did, scilicet, that the tenant was bound in a statute merchant to the testator, and the executors sued execution for non-payment, and was seised and disseised by the tenant; the tenant said that he paid the money to the testator, and shewed thereof acquittance, & non allocatur, but the affise awarded whether execution was made or not, without enquiring of the payment or acquittance; for if it be so, then he shall have *audia querela*. Br. Affise, pl. 279. cites 28 Aff. 7.*

8. In affise the tenant pleaded bar, and the plaintiff said that the tenant himself was seised, and infeofed him, and so was he seised till disseised &c. and good title by feoffment of the tenant himself, quod nota; and if it be found for the plaintiff, the defendant shall go to prison for the entry against his own feoffment. Br. Titles, pl. 47. cites 28 Aff. 8.

8. In affise the tenant pleaded a recovery against the ancestor of the plaintiff, he said that his ancestor died seised after, this is no title without shewing how he came by it after the recovery, quod nota. Br. Affise, pl. 411. cites P. 32 E. 3.

9. So if the title had been found by verdict [to be] after the recovery, quod nota. Ibid.

10. Affise of common in piscary in T. from such a place to such a place, and because it was of profit apprender in alieno solo, he was compelled to shew title, quod nota, title in the plaint, by which he shewed that A. was seised of the manor of B. with the piscary appurtenant, and granted the manor with the piscary &c. Br. Affise, pl. 337. cites 34 Aff. 11.

11. Of a thing which bears countenance to be against common right, the plaintiff shall make title in his plaint, as of office, common &c. Contra of a rent, though it be rent-charge or rent-seck; for it may be intended rent service till title be made, quod nota. Br. Plaint, pl. 1. cites 35 H. 6. 7.

Br. Plaint,  
pl. 17. cites  
S. C.

Br. Affise,  
pl. 13. cites  
S. C. —  
A title must  
be made for  
a rent  
charge or  
rent seck,

but the first possession without any other title serves in an affise of land. Jenk. 42. in pl. 79. In affise for the office of one of the clerks of the Privy Signet, it was ruled that where 'tis brought for a thing against common right, the demandant ought to make title in his count specially; but where it is brought for lands &c. there it is *delibero tenemento* generally. Sid. 73. pl. 3. Pasch. 14 Car. 2. B. R. Windebanke v. Beere.

12. A man shall make good title in affise, by saying that J. N. was seised in fee to the use of W. P. which W. P. infeofed the plaintiff, who was seised and disseised &c. without shewing what person made the feoffment to the use of W. P. or how the use commenced. Br. Titles, pl. 61. cites 36 H. 8.

13. In affise of a portion of tythes, exception was taken that the title was double, because the demandant prescribed in the prior of S. &c. but held contra; for the seisin of the portion only does not make good title in the prior of S. no more than of a rent or of any other thing or profit in the soil, or fee of another, which commenced against common right; because, in all other cases, the commencement thereof must necessarily be alleged by him, who is to make title thereto, whether he be privy thereto or a stranger; for it is against reason to charge the inheritance or franktenement

ment of another, without shewing a substantial foundation thereof. D. 83. a. b. pl. 77. 85. b. pl. 90. Pasch. 7 E. 6. Bristol (Dean and Chapter) v. Clerke.

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14. An assise of land does *not comprehend a title*; it is founded only upon the seisin and disseisin. Jenk. 42. in pl. 79.

### (E. a) Declaration, and Plaint in Assise. By what Name.

1. **I**N assise of estovers, title shall be made in the plaint, scilicet, *de libero tenemento suo in dale*, and shall make his plaint of *reasonable estovers apprender &c.* scilicet, *house-boot, hay-boot*, to build a new house, and to repair the old; and to inclose, and to burn in his chamber, hall, and to wash, brew, and bake from year to year, in *20 acres of wood, by view of the forester*, or without view &c. *appurtenant to his house in dale.* Br. Plaint, pl. 33. cites 4 E. 2. and Fitzh. Assise 451.

Br. Nofme,  
pl. 37. cites  
S. C. —  
Br. Depo-  
sition, pl. 7.  
cites S. C.

2. Where a man is *ousted* of his guardianship of a chapel &c. *by one who has colour*, as by an undue deprivation of the ordinary, *he ought to sue to be restored to the name, before he brings suit by this name*; but if he be *ousted by him who has no colour*, there he shall bring assise by name of guardian, quod nota differentiam bene. Br. Assise, pl. 187. cites 13 Ass. 2.

### (F. a) Plea in Bar. Good.

1. **I**N assise the tenant shewed that he himself was seised, and leased to A. upon condition &c. for life, who leased his estate to the plaintiff, who broke the condition, and shewed how, and by which he entered without doing wrong; judgment &c. and the assise found accordingly, by which the plaintiff took nothing by his writ. Quod nota. Br. Assise, pl. 153. cites 10 Ass. 9.

2. In assise the tenant said that A. leased to the plaintiff for life, who surrendered his estate to his lessor, whose estate the tenant has, judgment if assise; and because he was a stranger &c. the assise was adjudged; for by this he shall answer to the ouster made by his feoffor, and not to the ouster, which is supposed to be made by himself. Br. Assise, pl. 161. cites 11 Ass. 1.

3. In assise purparty was pleaded in bar between parceners, and the plea good, without saying that the plaintiff was seised of his part, and the plaintiff said that they held in common, absque hoc that purparty was ever made &c. and the assise awarded. Br. Assise, pl. 176. cites 11 Ass. 29.

4. In assise 2 put them in arbitrement, of whom the one has no title, and award is made between them that they shall hold in common, it is a good bar in assise, though the award be not in writing. Quære tamen. Br. Assise, pl. 182. cites 12 Ass. 25.

5. In assise of a rent-charge against a feme and others, the feme pleaded

pleaded that she was endowed before the charge commenced, and the plaintiff compelled to answer to it. Br. Assise, pl. 184. cites 12 Aff. 40.

6. In assise *utlawry in trespass* was pleaded in bar, and the plaintiff shewed thereof charter of pardon, and had assise, notwithstanding that he did not shew title after the outlawry. Brooke says, Miror [ 211 ] that outlawry in trespass shall be a bar. Br. Assise, pl. 189. cites 13 Aff. 5.

7. In assise it is a good plea that the land was given to the plaintiff and this defendant, and to the heirs of the defendant, and that the plaintiff aliened in fee, by which the defendant entered for alienation to his disinherittance, and a good bar; but it seems that of the one moiety this was disseisin to the plaintiff, and of the other moiety alienation to his disinherittance. Br. Assise, pl. 205. cites 16 Aff. 11.

8. In assise the tenant said that his father was seised in fee, and died seised, and M. mother of the tenant (who then was an infant) seised for cause of nurture, and married the plaintiff who aliened in fee, and re-took to him, and the defendant freshly at full age entered; and admitted for a good bar. Quod nota. Br. Assise, pl. 206. cites 16 Aff. 12.

9. In assise the tenant said that the land descended to the plaintiff, and to one W. who made purparty, so that the moiety was allotted to the plaintiff, whereof he is now seised at his will, and the rest to the other, who infeoffed the tenant; judgment if assise, and a good bar. Br. Assise, pl. 245. cites 22 Aff. 29.

10. In assise the tenant pleaded *jointenancy by fine with a stranger not named*, and the plaintiff replied nient comprise. Per Cur. he shall not have the plea, nor sole tenant the day of the writ purchased; for jointenancy is at the common law, to which he shall have no answer; but if it was by deed, the writ shall abate by the common law, and fine is at common law, so that he shall not have the plea, that sole tenant the day of the writ purchased, as by statute. Br. Assise, pl. 92. cites 24 E. 3. 36. 78.

11. Tenant of the franktenement, as the writ supposed, is no plea in assise; for the writ of assise supposes no tenancy in the one no more than in the other. Br. Assise, pl. 92. cites 24 E. 3. 36. 78.

12. In assise the tenant shewed custom in the fee of S. of which he is lord, and that the feme should have the land during her life, if she held herself a widow; and that if she married, that the lord shall have it for her life; and shewed that, such widow held, and after married, and he as lord entered &c. Et miror that he did not aver that she is yet alive; and the plaintiff got confessing the custom said, that long time before that she took the first baron, she herself was seised &c. and the opinion of the Court was, that it is a good title of her own seisin, without making other title: quod nota, and quære legem inde. Br. Assise, pl. 258. cites 25 Aff. 11.

13. In assise the tenant entitled himself by fine, and the estate of the plaintiff mesne between the fine and the execution thereof sued; and it was awarded a good bar. Br. Barre, pl. 65. cites 29 Aff. 1. S. P. and by Newton this is no bar; quod fuit

concessum Br. Barre, pl. 26. cites 21 H. 6. 17. and says it is said there, that the diversity between this and the plea of a recovery against a stranger, and the estate of the plaintiff in mesne, is in Hill. 8 E. 3.

14. In assise in O. the defendant said that the tenements are in B. and not in O. Judgment of the writ, and if &c. [then he pleads] jointenancy by charter with N. &c. Fish said, you have pleaded to the assise, and because you have pleaded misnomer of the vill as sole party, you have *lost the advantage of the jointenancy*; and so was the opinion of the Court. Br. Assise, pl. 307. cites 30 Ass. 2.

15. In assise *several tenancy is no plea*, nor in attain founded upon it; for in assise, if the one be tenant and the other has nothing, it is sufficient. Quod nota bene. Br. Assise, pl. 311. cites 30 Ass. 24.

16. In assise it is admitted a good bar, that the defendant recovered damages in trespass in oyer and terminer against the plaintiff, and had this land in execution, which monies are not yet levied, judgment if assise. Br. Assise, pl. 336. cites 34 Ass. 8.

[ 212 ] 17. And by some it is a good bar in assise that you ousted me, upon which I freshly re-entered &c. Br. Assise, pl. 30. cites 45 E. 3. 24.

18. Assise against tenant by the curtesy and the heir, and pending the writ the tenant by the curtesy surrendered and died, and the heir pleaded the descent pending the writ to the writ, and yet the heir was awarded to answer, and the writ did not abate; for though he shall be now in by descent, yet at first he came to the land by his own act who made the surrender. Quære if he may plead such descent in bar. It seems that he shall not; for it was pending the writ; but Rolfe made his challenge to be entered. Br. Assise, pl. 101. cites 1 H. 6. 1.

19. In entry in nature of assise, there the tenant said that *ƴ. his brother was seised in fee, and died seised, and he entered as heir, and was seised till by the demandant disseised*, upon which he entered, judgment &c. and no plea per Cur. by which he said ut supra, *absque hoc that he disseised him, prius*, and the other e contra. Martin ordered the clerk to enter no more but whether he disseised him or not, quod nota. Br. Assise, pl. 68. cites 8 H. 6. 2.

S. P. accordingly, because in this case no descent can toll his entry after this recovery.

20. In assise the tenant pleaded recovery against a stranger, and the estate of the plaintiff mesne between the title of his writ and the recovery, this is a good bar. Br. Barre, pl. 26. cites 21 H. 6. 17. per Newton.

Kelw. 106. b. pl. 20. Casus incerti temporis.—Pl. C. 26. b. Arg. cites S. C.

21. The tenant pleaded that *A. was seised, and leased to B. for life, and afterwards E. granted the reversion to the now tenant in fee, and the tenant attorned, and afterwards aliened to T. in fee, upon whom he entered for the disinherittance, and the title of the demandant mesne between the alienation and the entry, and no plea per Newton*, for it may be true that the estate of the tenant is mesne &c. and yet it may be that the father of the demandant disseised the alienee,

alienee, and died seised, and this demandant in by descent; in which case the entry of the tenant is not lawful; but Ascue, Porting, and Martin held it a good bar, because it is good to a common intent, and if there is such special matter, the demandant may shew it. Br. Barre, pl. 26. cites 21 H. 6. 17.

22. In assise the tenant pleaded that he was seised till by N. disseised, upon whom he entered, and the estate of the plaintiff mesne between the disseisin and the re-entry. Per Newton this is no bar; but Fulth. Ascue, Yelverton, Porting, and Markham, e contra, held it a good bar. Br. Barre, pl. 26. cites 21 H. 6. 17.

Kel. 103. b. pl. 8. Casus incerti temporis, seems to be S. C. but says that because it may

be that the plaintiff came to the land by descent, or by feoffment by one who was in by descent, it is no plea. — Ibid. 106. in pl. 20. S. P.

23. But that otherwise it is where the tenant pleads that he infeoffed J. upon consideration, and that he entered for the consideration broken, and that the estate of the plaintiff is mesne, this is a good plea, because he may enter upon any descent. Kelw. 103. b. pl. 8.

24. So if he alleges that his tenant who holds of him aliened in mortmain, and he within the year entered, and the estate of the plaintiff mesne between the alienation in mortmain and his entry, this is a good plea, because in these cases the entry of the tenant is not tolled by any descent. Kelw. 103. b. pl. 8.

S. P. because in this case a descent cannot toll the entry of the lord. Kelw. 106. b. pl. 20.

Casus incerti temporis, and cites 2 E. 4. 6. like matter of entry upon the statute.

25. In assise of 2 houses it is a good plea that they are tofts, and not houses, judgment of the writ. Br. Assise, pl. 397. cites 26 H. 6.

26. Lease for years is no bar in an assise, but shall say nul tort, and give the matter in evidence. Br. Barre, pl. 80. cites 5 E. 4. 3.

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27. In assise, if the plaint is of an acre of land, the tenant may say that it is an acre of wood &c. to compel the plaintiff to shew title &c. Br. Assise, pl. 497. cites 2 H. 7. 4.

28. In entry in nature of assise, the tenant said that J. S. was seised till by D. disseised, upon whom he re-entered, que estate the tenant has, and no plea, because his bar does not comprise title; for it is not in effect but that J. S. was seised, que estate he has, which is no plea; but if he says that J. S. was seised in fee, and infeoffed him, and gives colour, this is a good bar; for there is title; and also it is not good because he does not confess an entry by himself but by J. S. and in this agrees 5 H. 7. 11. in trespass in consimili casu; quod nota. Br. Barre, pl. 1. cites 26 H. 8. 4.

29. A man may plead a feoffment in assise made to the plaintiff by the defendant by deed indented, by which the defendant infeoffed the plaintiff upon condition, and that he entered for the condition broken; for there he bound the plaintiff. Br. Assise, pl. 483. cites Littleton, lib. 3. tit. Estates upon Condition.

## (G. a) Pleas in Bar. What good. Feoffment, Release, &amp;c.

1. **I**N assise the *tenant pleaded a deed of the ancestor, with warranty in bar*, and the *plaintiff denied the deed*, and process was made against the witnesses against the next sessions; and so see that deed of the ancestor with warranty is admitted to be a good plea in bar in assise of novel disseisin. Quod nota. Br. Assise, pl. 18. cites 44 E. 3. 5.

2. In assise, the *tenant pleaded a feoffment of the brother of the plaintiff, rendering rent, and a release after of the same brother with warranty*, and relied upon the warranty, and admitted. Br. Assise, pl. 140. cites 8 Ass. 4.

3. Assise against the baron and feme, who said, that the feme and her first baron leased the tenements to the plaintiff for years; the baron died, the term expired, and this baron and the feme entered; judgment if assise; and held a good bar, and after the defendant waved the plea, and pleaded to the assise; quære of the bar at this day. Br. Assise, pl. 64. cites 21 E. 3. 13.

4. Assise of common, a deed of release, and confirmation of the father of the plaintiff was pleaded in bar, made of the soil to the tenant to hold in fealty with warranty, and because the deed and warranty go to the land, and the common only is in plaint, therefore no plea, but the assise awarded, for this does not extend to the common. Br. Assise, pl. 246. cites 22 Ass. 38.

5. In assise, the *tenant pleaded the feoffment of the plaintiff as assignee in bar*, & non allocatur, per Thorpe Ch. J. and Brooke says it seems to be good law; otherwise it seems of a feoffment with warranty, relying upon the warranty. Br. Assise, pl. 298. cites 29 Ass. 24.

6. In assise, the *tenant said that the plaintiff infeoffed him in exchange for other land in D. whereof the plaintiff is yet seised*, and held a good bar, for it is not simply a feoffment, but upon the matter the plaintiff has quid pro quo, and so see feoffment is no bar. Br. Assise, pl. 314. cites 30 Ass. 40.

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7. In assise, the *tenant pleaded a devise in bar* according to the custom of the vill of N. and J. your father devised the land &c. judgment if assise. Persey said, he does not plead warranty against us, nor any thing to which we are bound to answer; but the opinion of the Court was, that it is a good bar though he did not allege the devise to be executed; for the law intends it, if the contrary be not shewn, by which the plaintiff traversed the devise. Br. Assise, pl. 320. (319) cites 31 Ass. 8.

8. A lease by the plaintiff to the tenant for life, or a feoffment, is no bar in assise, for these amount to nul tort, and shall be given in evidence. Br. Assise, pl. 352. cites. 38 Ass. 26.

S. P. as to the feoffment, but contra of a lease for life, if he relies upon the reversion by a warranty; quod nota. Br. Assise, pl. 380. cites 6 H. 7. 14.

S. P. Br. Assise, pl. 94.

9. Trespass in assise, the defendant pleaded the *feoffment of the plaintiff*



*plaintiff made to him*, this is no plea, for it *does not amount but to nul tort, nul disseisin*; † but if he pleads the *feoffment of the plaintiff to J. N. whose estate he has*, this is a good plea without giving colour, per Pigot; quod nullus negavit: Br. Assise, pl. 81. cites 15 E. 4. 31.

cites 4 H. 6. 29. per Paf-ton, which Martin J. agreed. † S. P. Ibid. pl. Quod nota.

152. cites 10 Ass. 5. and the plaintiff was compelled to answer to his own deed.

10. Note, per Littleton and Vavisor, that it was held by all the justices of England, that a *lease for years, the reversion to the plaintiff*, was a good bar in assise. Br. Assise, pl. 39.: cites 18 E. 4. 10.

Thel. Dig. 215. lib. 15. cap. 4. f. 21. cites S. C. & S. P. accordingly; and 32 Ass. 6. as to the term for years, tho'

11. *So \* for term of life, the reversion to the plaintiff &c.* Ibid.

12. *So of a feoffment in fee with warranty, and relying upon the warranty*, and so it seemed to them. Ibid.

this plea amounts only to No tenant of the franktenement named &c.——[The Year Book says, that Littleton shewed to Vavisor, coming from Westminster, that these points were so held by all the justices in England.]——Jenk. 142. pl. 92. cites S. C. that all these are good. But the lessee for years cannot plead assisa non, because that is the form of the plea in bar for the tenant of the freehold, the lessee for life or the feeoffee; but it ought to plead the said special matter, viz. his lease for years, the reversion to the plaintiff, and that he is in possession, and so in without wrong. D. 246. b. pl. 71, 72. Hill. 8 Eliz. Carew v. March. S. P. as to the assisa non.——Lessee for years cannot plead in bar of assise, no more than disseisor or bailiff &c. for his plea should be, no tenant of the franktenement named in the assise. D. 207. a. pl. 13. Mich. 3 & 4 Eliz.——Co. Litt. 229. a. S. P.——Jenk. 224. in pl. 83. S. P. and may add, and if not so found, then no wrong, no disseisin.

\* In assise, a *lease for life and rent reserved, the reversion to the plaintiff it pleaded by the tenant, with a reliance on the rent reserved*, is a good plea, and not otherwise; and *so of a feoffment by the plaintiff with warranty*, it is not a plea without relying on the warranty; for it amounts to the general issue, and is double. Rent and reversion make a warranty. A warranty to lessee for years is no more than a covenant, and is not a warranty to vouch. Jenk: 224. pl. 83.

In *assise of rent*, the tenant pleaded that he held the rent for term of years, of the grant of the ancestor of the plaintiff, and so is the franktenement in the plaintiff; judgment, if during the term he ought to have assise &c. Thel. Dig. 215. lib. 15. cap. 4. f. 2. cites 44 Ass. 1. and says that of such form are divers bars pleaded in the Book of assise by guardians in chivalry, tenants by statute merchant, and by elegit, and cites 38 Ass. 4. 4 H. 6. 27.

13. In an assise, if the tenant *pleads that he leased the land to the demandant for years*, this is no good plea, because the complaint is of the disseisin of a freehold, and by this plea the tenant gives the demandant *no colour to have an assise*. Kelw. 103. b. pl. 6. *Casus incerti temporis*.

But if the tenant will say that the plaintiff leased to him the land for a term of

years, which is yet continuing, this is a good plea, because he has confessed a franktenement in the plaintiff; and also this reversion implies in itself a warranty, to which the plaintiff shall be compelled to answer. Kelw. 103. b. pl. 6. *Casus incerti temporis*.

14. Every man shall plead what is apt and pertinent to his case, and therefore a disseisor that is not tenant of the land shall not plead any thing that concerns the tenancy of the land, as a release of actions real; but he shall plead a release of actions personal, [ 215 ] or any other plea that excuses him of damages. 2 Inst. 414.

15. A disseisor cannot plead that he is *not tenant*, for this is the form of a bar, which bar nobody can plead but the tenant of the freehold. Jenk. 224. pl. 83.

## (H. a) What is a good Plea in Bar. Recovery.

1. IN assise, the tenant pleaded in bar that he himself recovered the same tenements by assise against A. and B. then tenants, and the estate that the plaintiff had was by abatement upon J. pending the writ &c. judgment &c. and it was held a good bar. Br. Assise, pl. 143. cites 9 Aff. 10.

2. In assise the tenant pleaded a recovery of the same tenements before the same justices in assise against the plaintiff. The plaintiff said that it was of other tenements taken by the first jurors and others, and the other e contra, and process made against the first jurors, and by them and others it was enquired if they were the same tenements or not, and did not say that, not comprised; for this shall be tried immediately, because judgment in assise is quod recuperet per visum jur. and not so in other cases. Br. Assise, pl. 236. cites 22 Aff. 16.

S. F. Br.  
Assise, pl.  
418. cites  
44 E. 3.  
But cites  
temp. H. 8.  
contra.

3. In assise of tenements in B. the tenant pleaded a recovery in assise against the plaintiff himself of the same tenements in S. and the same tenements put in view, and he recovered, judgment if assise &c. and the plea awarded good per Curiam, by which the demandant said that, not put in view, and so, not comprised; and the other e contra. Br. Assise, pl. 28. cites 44 E. 3. 4. and 18 Aff. 16. 19 E. 3. Fitzh. Aff. 77. and 23 Aff. 16.

Br. Titles,  
pl. 13. cites  
S. C.

4. If the tenant makes a bar at large, the plaintiff makes title by recovery, and the tenant destroys the recovery by proving it to be void; it is no plea without making to himself title; for if the plaintiff was in by a void recovery, it is no resort to the tenant; for it is not lawful for the tenant to enter upon him, if he has not title; and so see that the tenant shall not avoid the title of the plaintiff without making title to himself. Br. Assise, pl. 103. cites 36 H. 6. 33. 34.

5. If a man brings a writ of forcible entry against me, and my entry is found lawful, and after he brings assise, this recovery shall be a bar of the assise, if the assise be of the same entry, but not otherwise; per Brian, and affirmed by all the justices. 11 H. 7. 16. a. pl. 12.

## (I. a) What is a good Plea in Bar. Seisin in the Plaintiff.

Thel. Dig.  
148. lib.  
11. cap. 35.  
f. 3. cites  
S. C.—In

1. IN assise of rent it is a good plea to the assise, that the rent is issuing out of 20 acres of land, of which the plaintiff himself is seised of parcel; quod nota. Br. Assise, pl. 113. cites 3 Aff. 18.

assise of rent-charge it was pleaded, that the plaintiff was seised of the franktenement of the land out of which &c. the day of the writ purchased &c. upon which the assise was taken, and found that the plaintiff continually took the profits &c. by which the writ was abated. Quere, for it may be that he had nothing but at another's will. Thel. Dig. 148. lib. 11. cap. 35. f. 9. cites 28 Aff. 41.

2. In assise the tenant pleaded to the assise by bailiff, which remained for default of jurors, and at another day the tenant came in proper person, and said that the plaintiff had recovered of him the said tenements pending the writ, and after leased to him again for years, so is the plaintiff seised of the franktenement; judgment of the writ, and had it, notwithstanding that certification does not lie of it. The reason was; inasmuch as this comes of later time, by which the plaintiff said that the defendant has continued his estate by disseisin, absque hoc that he took any estate of him, and they were at issue upon this, and the assise charged over of the seisin and disseisin. Br. Assise, pl. 158. cites 10 Ass. 24.

3. In assise against 2, the one said that the plaintiff was seised the day of the writ purchased &c. and because the other pleaded as tenant, he was ousted of this plea; therefore it seems none shall have this plea but the tenant, and not disseisor. Br. Assise, pl. 268. cites 26 Ass. 49.

4. In assise the tenant said that N. was seised in fee, and died seised, and the land descended to 2 daughters, who entered and made purparty, and conveyed by descent from the one to himself, and from the other to the plaintiff, and that of the moiety the plaintiff is seised at will; and the plaintiff said that the one daughter was sole seised, and died seised, and conveyed to himself, and the other maintained his bar, and traversed the sole dying seised. Br. Assise, pl. 285. cites 28 Ass. 30.

5. In assise the tenant said that A. was seised in fee, and died seised, and the land descended to the plaintiff, and to B. and C. which estate of B. and C. the tenant bars, and the plaintiff is seised of the 3d part at will; judgment if assise of 2 parts &c. and a good bar. Br. Assise, pl. 297. cites 29 Ass. 22.

6. In assise of rent, the tenant pleaded, *hors de son fee*, and the plaintiff shewed deed of rent charge, upon which the tenant rejoined, that the plaintiff, by force of a recovery, had upon false title, is seised of parcel of the land charged &c. and held per Cur. that the tenant shall not have this plea after *hors de son fee* pleaded; yet the assise was charged, and found that the plaintiff was seised of parcel &c. yet the plaintiff recovered, and the rent was apportioned, because the tenant did not say any thing to the contrary, but it was said that the rent should be extinct for all. Thel. Dig. 149. lib. 11. cap. 35. f. 10. cites 30 Ass. 12. and that so it is agreed, if the plaintiff comes to parcel by purchase, but otherwise it is if he comes to parcel by descent; cites 34 Ass. 15.

## (K. a) What is a good Plea in Bar. Misnoscmer. Want of Addition.

1. IN assise the defendant pleaded *misnoscmer*, and if &c. *hors de son fee*. There *hors de son fee* is void; for it is a bar, and the conclusion of the first plea; and if it be not found, nul tort &c. it is the general issue, and then the bar comes too late, as

the general issue is gone before. Br. Assise, pl. 433. cited 3 E. 3. 15. and Fitzh. Assise 172.

2. It was held that *tenant in assise, who pleads misnoscmer of himself, shall not say, et si trove soit &c.* Thel. Dig. 123. lib. 11. cap. 5. f. 4. cites Mich. 5 E. 3. 224.

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*Misnoscmer of disseisor shall not abate the writ of assise, if the tenant be well named.*

Thel. Dig. 123. lib. 11. cap. 5. f. 5. (his) cites Pasch. 10 E. 3. 501.

3. Thel. Dig. 123. lib. 11. cap. 5. f. 5. says that Mich. 5 E. 3. 237. an opinion is, that the *disseisor shall not plead misprison of his name*, and that in assise of *rent the misnoscmer of tenant of parcel of the tenements, of which &c.* shall not abate the writ but only for himself.

4. None shall plead *misnoscmer of the vill* but the *tertenant*. Br. Assise, pl. 197. cites 14 Ass. 16.

5. Assise in *D.* it is no plea that *there are 2 D.'s, and none without addition*; for the plaintiff shall recover by view of the jurors. Br. Assise, pl. 304, cites 29 Ass. 53.

6. In assise, the *tenant said the land is in another vill, and if &c.* *no tenant of the franktenement named, and if &c. nul tort, and per Cur.* the first plea destroys the 2d, for *none shall say that the land is in another vill but the tenant, and therefore by this he has taken the tenancy*; so that he cannot say, *no tenant of the franktenement named &c.* Quod nota. Br. Assise, pl. 339. cites 30 H. 6. 1.

7. In assise *by a corporation to plead that there is not any such corporation*, goes in bar, and not to the writ of assise, by which the tenant pleaded, *that the corporation was incorporated by another name &c.* Et si trove soit &c. Thel. Dig. 124. lib. 11, cap. 5. f. 22. cites Mich. 22 E. 4. 33.

S. P. Br. Assise, pl. 471. cites 14 E. 3. and Fitzh. Brief, 417.

### (L. a) What is a good Plea in Bar. Nontenure.

1. **A**SSISE of a thing which the plaintiff claims by reason of an office, as the Warden of the Fleet &c. it is a good plea, that the plaintiff has nothing in the office. Br. Assise, pl. 495. cites 6 E. 2. It. Canc.

2. Assise against 2, the one said that he had nothing &c. and the other said that he was the villein of W. and held the land of him in villeinage &c. judgment of writ &c. and the writ was abated by award; but at this day it is no plea in assise to say that he had nothing, for this is nontenure, and nontenure is no plea in assise, for no land is in demand in the writ; but shall say, *no tenant of the franktenement named in the writ, and if &c. nul tort &c.* Br. Assise, pl. 132. cites 8 Ass. 14.

3. In assise against 3, he who is not tenant shall not say that the plaintiff never had any thing, and if &c. nul tort, quod nota, per Cur. Br. Assise, pl. 276. cites 27 Ass. 65.

(M. a)

(M. a) Plea good. Other Assise or Actions brought at other Time.

1. **A**SSISE of a piece of land, containing 40 foot in length and 12 in breadth, the defendant said, that the plaintiff brought assise of the same land, and made his plaint; and pending this, has brought this assise of the same land, and the quantities do not agree, and yet because he did not deny but that it was of the same land, the writ was abated, and it seems otherwise, if the plaintiff had not appeared to the first assise, which he did, as appears by his plaint thereof made. Br. Assise, pl. 177. cites 12 Aff. 1. [ 218 ]

2. In assise, it is no plea that the plaintiff has other assise pending of the same land, which was elder than this assise &c. if the plaint was not made, for a man cannot know of what thing he will make his plaint [in the first writ]. Contra in dower, 11 E. 3. Br. Assise, pl. 190. cites \* 14 Aff. 7.

S. P. Br. Assise, pl. 300. cites 29 Aff. 40. for otherwise it cannot appear whether it

be the suit of the plaintiff, nor of the same land. — S. C. cited 5 Rep. 61. b. in Sparry's Case. — \* This should be 14 Aff. 6.

3. A retraxit is a bar in law in assise &c. and therefore in another assise the retraxit, in the first assise was pleaded in bar; contra of nonsuit. Br. Barre, pl. 93. cites 15 E. 3. and Fitzh. Assise, 96.

4. In assise of common of pasture appendant, it was pleaded in bar, that the father of the plaintiff had brought quod permittat of it, which is a more high nature in bar; and the Court would not suffer it, notwithstanding that the plaintiff would have made title, quod nota, for it is no bar. Br. Assise, pl. 198. cites 15 Aff. 3.

5. In assise, the tenant pleaded that the plaintiff had brought writ of entry in the post of the same tenements, against the tenant in which he had the view, which is yet pending; judgment of the writ of a more base nature, and they were at the assise, if it was parcel of the tenements comprised in the writ of entry or not, and per Lod. it is a good plea for the plaintiff, that, before the bringing of the writ, he was seised till by the defendant disseised, and that after the bringing of the writ of entry he re-entered, and was seised till by the defendant disseised; quære, for of his own possession he cannot make title at this day. Br. Assise, pl. 305. cites 29 Aff. 66.

6. Assise by a feme, the tenant said, that at another time the feme brought cui in vita against N. whose estate he has, to which writ he appeared; judgment if he shall bring writ of a more base nature, and held a good plea. Fish said, in this suit N. appeared and disclaimed, by which the plaintiff entered, and was seised and disseised, and a good plea, and the assise was awarded; quod nota. Br. Assise, pl. 333. cites 33 Aff. 5.

Br. Tides, pl. 35. cites S. C.

(N. a) Pleas good. Where several Defendants plead several Pleas.

1. **A**SSISE against 2, the one took the entire tenancy of parcel, and pleaded to the assise, the other took the tenancy of the residue, and pleaded jointenancy by deed with a stranger, by which the assise was not taken against the first, for it cannot be taken by parcels; but process was made by the statute de conjunctim feofatis to maintain the issue, and idem dies to the other. Br. Ass. pl. 436. cites 19 E. 2.

2. Assise against 2, each took the entire tenancy severally, and pleaded severally in bar matter of difficulty, by which the plaintiff elected the one for tenant as he ought, and demurred upon the other, there if the justices will adjourn the parties for difficulty of the bar, yet they ought first to enquire of the tenancy, and because they did not, but adjourned in Bank, therefore it was remanded from the Bank to enquire of the tenancy; and so see in this case assise by parcels; and it seems that in this assise, assise may be twice taken. And in the next assise there against the same record, and failed at the day, this failure does not prejudice him, but they shall enquire of the tenancy; and upon this he was found tenant, and had a new day to have the record certified, quod nota parties, it is agreed that the Court shall not suffer any issue when the tenancy is in debate, till the tenancy be enquired; and because they suffered the one to be at issue whom the plaintiff elected tenant, and vouched bene. Quære if this be usual at this day. Br. Assise, pl. 339. cites 35 Ass. 2. 3.

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(O. a) Pleas good. Where several Defendants plead several Pleas in Assise of Rent.

Br. Assise, pl. 96. S. P. cites the Book of Entries, fol. 129.

1. **I**N assise of rent against several, the one answered as tenant with 3 of the others, and as to any rent issuing out of the tenements which belonged to him, he pleaded in bar, and another answered as tenant with the other 3, and as to any rent issuing out of that which belonged to him of the tenements pleaded other matter; and so the 3d, and every one who takes the tenancy ought to say, that there is not any perrour of the rent named in the writ; and so they did. Br. Pleadings, pl. 39. cites Book of Entries.

(P. a) What Pleas Disseisor may plead,

But in the Year-Book the reporter says Quære tamen; for he doubts of it.

1. **D**ISSEISOR who comes in person may plead to the writ, as it is said. Br. Assise, pl. 130. cites 8 Ass. 2.

2. In assise, disseisor shall not plead jointenancy. Thel. Dig. 194. lib. 13. cap. 2. f. 1. cites Pasch. 18 E. 3. Assise 77.

3. Disseisor

3. Disseisor shall not plead any record to delay the assise. Thel. Dig. 194. lib. 13. f. 2. cites it as said 19 Ass. 10.

4. In assise by A. and B. his feme, one who was not tenant pleaded to the writ that the feme plaintiff, as feme to one W. by fine levied between W. and B. his feme, and a stranger, rendered the land to the same stranger, que estate he has &c. which W. is yet in full life &c. Judgment of the writ, supposing B. to be the feme of A. and held no plea in the mouth of the disseisor. Thel. Dig. 194. lib. 13. cap. 2. f. 2. cites 19 Ass. 10.

5. Disseisor shall not plead outlawry in the plaintiff without having the record thereof ready. Thel. Dig. 194. lib. 13. cap. 2. f. 2. cites 20 E. 3. Assise 120. Quære.

6. It is said by Shard, that in assise brought by a feme sole a disseisor cannot plead that she is covert with such a one &c. Quære. Thel. Dig. 194. lib. 13. cap. 2. f. 9. cites Pasch. 20 E. 3. Assise 120. and 19 Ass. 10.

7. But disseisor shall plead misnomer of the plaintiff. Thel. Dig. 194. lib. 13. cap. 2. f. 3. cites 22 Ass. 1. So he shall plead misnomer of himself.

Thel. Dig. 194. lib. 13. cap. 2. f. 3. cites 28 Ass. 38.

8. Disseisor shall not plead that there are two dales, and none [ 220 ] without addition. Thel. Dig. 194. lib. 13. cap. 2. f. 5. cites 28 Ass. 38.

9. Disseisor shall not plead that one named in the writ died before the writ purchased. Thel. Dig. 194. lib. 13. cap. 2. f. 6. cites 29 Ass. 70.

10. Disseisor shall not say that parcel is in another will not named. Thel. Dig. 194. lib. 13. cap. 2. f. 7. cites 30 Ass. 5. Disseisor shall not plead that the tenements are in another vill.

Thel. Dig. 194. lib. 13. cap. 2. f. 12. cites Mich. 30 H. 6. 10

11. In assise, the tenant pleaded, that in writ of coignage brought by the same tenant against the plaintiff of the same land, the plaintiff had vouched as tenant after the date of the writ of assise &c. Judgment of the writ &c. and held no plea to be pleaded by disseisor who is not tenant. Quære. Thel. Dig. 149. lib. 11. cap. 35. f. 14. cites 43 Ass. 7.

12. Disseisor shall not plead that the plaintiff himself is seised of the tenements by saying that he himself has writ pending against the plaintiff of the same tenements, to which writ the plaintiff appeared as tenant, and vouched to warranty after the date of the assise &c. Thel. Dig. 194. lib. 13. cap. 2. f. 8. cites 43 Ass. 17.

13. A disseisor pleaded in bar that he was auterfoits acquit of the disseisin. Thel. Dig. 194. lib. 13. cap. 2. f. 10. cites 46 Ass. 10. Quære.

14. Disseisor may plead any plea which goes in bar, and not in extinguishment of right, as a release of all actions personal; and it was clearly admitted, that a release of all actions personal is a good bar in assise; but he can not plead a release of all the right. Br. Assise, pl. 14. cites 35 H. 6. 13. S. P. accordingly, and which go in excuse of damages. Thel. Dig. 194. lib. 13. cap. 2. f. 11. cites S. C.

15. Disseisor may plead that the plaintiff has entered into parcel after

after the last continuance &c. Thel. Dig. 194. lib. 13. cap. 25 f. 11. cites 35 H. 6. 13. agreed by Prisot.

16. So that there is *no tenant of the franktenement named in the writ*. Ibid. cites it as agreed by Prisot in the S. C.

17. So he may plead *jointenancy of the part of the plaintiff*. Ibid. per Prisot.

18. And he may plead the *bringing an action of an higher nature*. Ibid. cites it as agreed by Prisot. But cites 37 H. 6. 3. contra by Choke. Quære.

### (Q. a) Pleas. What good. By Pernor &c.

1. **A** PERNOR cannot plead ancient demesne after he is averred pernor, and the reason seems to be, because none shall have it but tertenant, and no pernor nor disseisor. Br. Assise, pl. 403. cites 1 H. 5. 4.

2. And so it seems that one who is averred pernor shall plead no plea after, but traverse the disseisin, or the pernancy of the profits; but he may plead a release of actions at first; but if he pleads another plea at first, and the plaintiff avers him pernor, now he cannot plead a release; for it is a departure now, and if he pleads this at first, the plaintiff cannot aver him pernor, for it is in vain; for a pernor shall have this plea. Ibid.

3. And so care ought be taken in assise, that pernor pleads such plea at first as pernor might have in cases where the plaintiff may aver pernancy; for if he pleads otherwise, and is averred pernor, he shall lose his plea; for he cannot plead a fine, recovery, release of the right, nor other matter by a que estate, nor such like; for this is only for the tertenant, if it be confessed and traversed. Ibid. and cites Fitzh. Assise, 141.

[ 221 ] 4. Disseisor or pernor may well plead a release of actions personal, Br. Assise, pl. 403. cites 35 H. 6.

### (Q. a) Plea good. By Bailiff.

S. P. and  
for that rea-  
son he shall  
not have aid  
of the King.

1. **I**T was said that a bailiff cannot delay the assise by his plea, Br. Aid del Roy, pl. 69. cites 1 Ass. 1.

Br. Assise. pl. 11. cites S. C.

S. P. but  
contra at  
this day, as  
it is said  
there; for  
as it seems

2. In assise of 10s. rent the tenant pleaded hors de son fee by bailiff, judgment if without specialty &c. and was received, notwithstanding it was by bailiff; but the law is contra now, as it is said there. Br. Assise, pl. 108. cites 2 Ass. 4.

clearly a bailiff shall not have any plea but where he may conclude over, and if &c. no tort, no disseisin. Br. Baillie, pl. 12. cites S. C. — Br. Baillie, pl. 22. cites 25 Ass. 6. that the tenant by bailiff pleaded hors de son fee, and the other e contra, and the assise charged thereupon upon the plea of the bailiff. — Ibid. pl. 36. cites S. C. accordingly; but Brooke says, Quod mirum.



3. In affise against *tenant in dower*, she cannot plead by bailiff that *nul tort &c.* but that *she is in dower ready to be attendant to whom the Court shall award.* Br. Baillie, pl. 33. cites 2 Aff. 12. S. P. Br. Baillie, pl. 34. cites 8 Aff. 19. but she may plead so in proper person, or by attorney.

4. In affise the bailiff cannot plead to the writ that it was purchased pending another writ, and that the plaintiff has taken continuance; for he shall not plead but that which excuses the tort of his master; and it is said that a disseisor who comes in person may plead to the writ. Br. Affise, pl. 130, cites 8 Aff. 2. Thel. Dig. 202. lib. 13. cap. 17. f. 1. cites S. C.—S. P. and so it seems that bailiff cannot have

plea but where he may conclude over nul tort, and this he cannot upon this plea, because it is triable by record, and not by affise. Br. Baillie, pl. 13. cites S. C.—Br. Baillie, pl. 43. cites 8 E. 3. S. P.—Br. Affise, pl. 425. (bis) cites 8 E. 3. S. P.

5. In affise the defendant said by bailiff that the tenements are parcel of the manor of D. which is ancient demesne; judgment of the writ, and if &c. He has nothing but for years, and if &c. nul tort. Per Herle, if you have nothing in the franktenement, you cannot plead ancient demesne. Quære if bailiff may plead ancient demesne; it seems that he cannot; for it is not triable by affise. Br. Baillie, pl. 14. cites 9 Aff. 2. If ancient demesne be triable by the affise, bailiff may plead it. Br. Baillie, pl. 16. cites 9 Aff. 9.—Thel. Dig.

202. lib. 13. cap. 17. f. 2. cites S. C. and 5 E. 4. 113. 6 H. 7. 15. and 8 H. 7. 11.

6. In affise the tenant said by bailiff, that pending the writ, and the day of the writ purchased, the plaintiff was seised by disseisin made to the defendant; judgment of the writ, and if &c. nul tort, and the affise awarded upon it. Br. Baillie, pl. 15. cites 9 Aff. 4. Thel. Dig. 202. lib. 13. cap. 17. f. 2. cites S. C. and Pasch. 9 E. 3. 453. 456.

7. Bailiff may plead *misfrision of the vill*, and of the name. Quod nota. Br. Baillie, pl. 15. cites 9 Aff. 4. Bailiff shall not plead *misfrision* of the vill,

if his master be not tenant. Thel. Dig. 202. lib. 13. cap. 17. f. 5. cites 14 Aff. 16. 14 E. 3. Bailiff 9. and 21 Aff. 27.

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8. Bailiff may plead any exception triable by the affise. Br. Baillie, pl. 15. cites 9 Aff. 4. Br. Baillie, pl. 29. cites S. C.

9. And in affise the tenant pleaded by bailiff that he is parson of such a church, and found his church seised &c. Judgment of the writ, in as much as he is not named parson, and if found &c. and allowed a good plea. Thel. Dig. 202. lib. 13. cap. 17. f. 4. cites 12 Aff. 4.

10. Bailiff in affise shall plead that parcel of the manor is in another vill not named. Thel. Dig. 202. lib. 13. cap. 17. f. 3. cites 13 E. 3. Bailiff 8. In affise against an infant, he pleaded by bailiff that

the plaintiff was his villein. And it was held, that he shall not have this plea by bailiff, but because the ward belonged to the king they enquired of the villeinage. Thel. Dig. 202. lib. 13. cap. 17. f. 9. cites tempore E. 1. Villeinage 35. and says it is held in replevin. Mich. 20 E. 3. Villeinage 10. that such exception does not lie in the mouth of bailiff.

Bailiff in affise shall not plead that the plaintiff is villein to his master; quod nota. Br. Baillie, pl. 44. cites 20 E. 3. time of E. 1. and Fitzh. Villeinage 10. and 35.

11. In assise, the tenant pleaded by bailiff to the assise *that he had recovered the same land against A.* and pleaded to the assise, which found accordingly, but the plaintiff recovered. But *sec* at this day bailiff shall not plead such plea, nor can *verdict* find matter of record. Br. Baillie, pl. 19. cites 14 Ass. 9.

Thel. Dig.  
202. lib. 13.  
cap. 17.  
f. 6. cites  
Mich. 15  
E. 3. Assise  
95. S. C. &  
P.

12. In assise of rent the bailiff of the defendant pleaded *misnomer of the vill*, and if &c. *that J. N. is pernor of the rent not named &c.* and was permitted to have both. Br. Baillie, pl. 42. cites 15 E. 3. Contra 14 E. 3. and see M. 30 H. 6. 1. that none shall say *that the land is in another vill* in assise but the tenant. Ibid. cites Fitzh. Assise, 45.

13. In assise of nuisance it was pleaded by bailiff, that the place in view, and in which &c. *extended itself into another vill*, which is not named in the writ &c. and admitted. Thel. Dig. 202. lib. 13. cap. 17. f. 7. cites Hill. 16 E. 3. Nuisance 11.

14. Assise in A. and B. one by bailiff said, *that A. is no vill nor hamlet, but a house in the vill of N. not named*, and if &c. nul tort, and they were in judgment whether he shall have the plea; it seems that he shall. Br. Baillie, pl. 20. cites 21 Ass. 27.

15. In assise, one was permitted to plead by bailiff *that the land is seised into the hands of the king for alienation without licence*, and so nul tort; quod nota. Br. Baillie, pl. 21. (bis) cites 22 Ass. 5.

16. Bailiff in assise cannot *confess the disseisin*, nor can the Court take it of him. Br. Baillie, pl. 35. cites 22 Ass. 35.

S. P. Thel.  
Dig. 202.  
lib. 13. cap.  
17. f. 10.  
cites Mich.  
24 E. 4. 31.  
and Hill.  
22 H. 6. 50.

17. In assise, the bailiff pleaded *that no tenant of the franktenement named in the writ*; judgment of the writ, and if &c. nul tort, and so it seems that the bailiff may plead this plea where his *conclusion* shall be over nul tort; but no plea which meddles with the tenancy. Br. Baillie, pl. 10. cites 24 E. 3. 31.

18. In assise, bailiff of disseisor shall not say *that the plaintiff had nothing &c.* and if &c. for his master shall not say so, by the opinion of the Court; for he has nothing in the franktenement. Br. Baillie, pl. 24. cites 28 Ass. 24.

19. In assise, the tenant came in person and pleaded in bar, and the plaintiff confessed and avoided the bar; the defendant imparled, and the next day came by bailiff, and pleaded to the assise, and was well received. Br. Assise, pl. 332. cites 32 Ass. 7.

20. Assise against two, the one took the tenancy, and pleaded in bar, and the other to the assise by bailiff, and the plaintiff chose him who pleaded to the assise for tenant, by which came he who pleaded to the assise by bailiff, and would have pleaded in bar, and was not received, but the assise awarded to enquire of the tenancy, and who is tenant, and of the seisin and disseisin, and found that he who pleaded to the assise was tenant, and that the plaintiff was seised and disseised, and they were adjourned, and at the day in Bank, because the justices had taken the assise of the tenancy, and of the seisin and disseisin, and all found for the plaintiff, therefore it was awarded that the defendant be forejudged to plead in bar, and therefore that the plaintiff recover; quod nota; as it is said there 20 E. 3. and here appears arguendo in debt. Br. Assise, pl. 33. cites 48 E. 3. 7.

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21. *Feoffment with warranty* cannot be pleaded by bailiff. See Br. Certification of Assise, pl. 3. cites 7 H. 4. 45.

22. It is said, that bailiff may plead *all pleas of which he may conclude, and if &c. nul tort* to the assise, but *not ancient demesne, fine &c.* which are bars. Br. Baillie, pl. 32. cites 8 H. 6. 9.

23. Bailiff may plead *jointenancy* without deed. Br. Baillie, pl. 32. cites 8 H. 6. 9.

Thel. Dig. 202. lib. 13. cap. 17. f. 13. cites

Mich. 5 E. 4. 113. S. P.—Ibid. f. 14. cites Pasch. 9 H. 7. 24. and 11 H. 7. 11. S. P. of the part of the tenant; but he shall not plead jointenancy by deed by the statute de conjunctim feoffatis, cites 34 E. 3. 1.—Note, that bailiff shall say that the plaintiff *has nothing but jointly* with such a one &c. Thel. Dig. 202. lib. 13. cap. 17. f. 12. cites Bailly, 14.

24. Bailiff may plead the *death of one of the plaintiffs in assise*. Br. Bailiff, pl. 7. cites 21 H. 6. 58. per Afcue.

25. *But* he shall not plead that there is *no such vill* in the same county, which has been adjudged. Ibid.

Bailiff may plead, *no such vill, and if &c. no te-*

*nant of the franktenement named in the writ, and if &c. that the plaintiff was not seised, so that he may be disseised, and if &c. nul tort, and if the plaintiff avers the tenant to be pignor of the profits, the bailiff may traverse it, & permittitur.* Br. Baillie, pl. 39. cites 1 E. 4. 4.

26. It is determined that bailiff *nor* disseisor can not plead that *there is in the same county 2 vills of the same name, and none without addition.* Ibid. cites 28 Aff.

27. Assise of 10 acres of land, and two acres of wood, the tenant said by bailiff that *as to 5 acres, no tenant of the franktenement named in the writ, and if &c. nul tort, and as to two acres of wood, it is parcel of the 5 acres, and so he demanded one thing twice*; judgment of the writ, and if it be not found [then] nul tort, nul disseisin; Browne said, this plea doth not lie in the mouth of the bailiff, *for it relates to the tenancy which bailiff cannot plead.* Br. Baillie, pl. 8. cites 22 H. 6. 44.

28. *But* he may plead *nontenure*, for this is as much as to say that no tenant of the franktenement is named in the writ, and so it amounts to no tenancy. Br. Baillie, pl. 8. cites 22 H. 6. 44.

S. P. Thel. Dig. 202. lib. 12. cap. 17. f. 2. cites Trin.

13 E. 3. Aff. 90. and 22 H. 6. 50.

29. *And* bailiff may plead *misnoms* of the plaintiff, but not of his master, therefore it is good that the tenant be advised, for by him he shall not afterwards plead other plea in person, nor by attorney, but those which lie in certificate, quod nemo dedixit. Br. Baillie, pl. 8. cites 22 H. 6. 44.

Br. Baillie, pl. 29. cites 9 H. 7. 24. that bailiff may plead misnoms of his master. —

But *ibid.* pl. 15. Brook makes a quere thereof.—Ibid. pl. 32. 8 H. 6. 9. that he may plead misnoms of his master.—So *ibid.* pl. 38. cites 26 Aff. 61. per Stonff. but not attorney, for 'tis contrary to his warrant. Quere.—Thel. Dig. 202. lib. 17. cap. 17. f. 14. cites Pasch. 9 H. 7. 24. and 11 H. 7. 11. that he may plead misnoms of his master.—But *ibid.* f. 13. cites 22 H. 6. 50. Contra, but he may plead it of the plaintiff. Ibid.—By the opinion of Mich. 5 E. 4. 113. he shall plead misnoms of any of the parties. Thel. Dig. 202. lib. 13. cap. 17. f. 13.

30. It was said by Brown, that bailiff shall not plead that the same thing is twice put in *plaint*. Thel. Dig. lib. 13. cap. 17. f. 13. cites Hill. 22 H. 6. 50.

[ 224 ] 31. Bailiff shall not say that the tenements are in another vill,  
S. P. e contra. Br. Baillie, pl. 8. cites 22 H. 6. 44.  
and if &c. nul tort. Br. Baillie, pl. 8. cites 22 H. 6. 44.  
file, pl. 383. cites 9 H. 7. 24. — Br. Baillie, pl. 29. cites S. C. — Thel. Dig. 202. lib. 13.  
cap. 17. f. 14. cites S. C. and 11 H. 7. 11. — Ibid. f. 13. cites Hill. 24 H. 6. 50. S. P.

32. Thel. Dig. 202. lib. 13. cap. 17. f. 13. says, that by the opinion of Mich. 5 E. 4. 113. he cannot plead *excommunication* or *outlawry* in the plaintiff.

33. Bailiff in assise shall plead for his master against the plaintiff, and so in without wrong done. Br. Baillie, pl. 28. cites 8 H. 7. 11.

34. Bailiff in assise shall have all challenges to the array, and the rolls as his master may have. Br. Assise, pl. 383. cites 9 H. 7. 24.

Thel. Dig.  
202. lib. 13.  
cap. 17. f.  
14. cites S.  
C.

35. A bailiff in assise shall not *disclaim* in the land. Br. Assise, pl. 383. cites 9 H. 7. 24.

Br. Baillie,  
pl. 46. cites  
S. C.

36. In assise, the tenant made default, and bailiff appeared for him, and count taken by the words *dies datus est partibus præd.* and did not say, ac etiam ballivo prædicto, and yet good; for the party may come after, and plead that which lies in certificate, and also judgment shall be given against the party, and not against the bailiff, and 30 precedents and more were shewn accordingly, that day was given to both; but per Cur. when day is given to the parties, it serves for the parties, their attorneys, guardians, bailiffs &c. Br. Continuance, pl. 86. cites 11 H. 7. 10.

37. In assise if a man appears as bailiff of the defendant, the plaintiff shall not have traverse that he is not his bailiff. Br. Traverse per &c. pl. 118. cites 15 H. 7. 17. per Townhend.

38. Any plea upon which certificate of assise lies, bailiff cannot plead. Br. Baillie, pl. 5.

39. In all cases where the plea of the bailiff is only *dilatory*, he shall conclude, and if it be found, nul tort, nul disseisin; as if he pleads, that the lands are in another vill, or misnomer of the plaintiff, or jointenancy without deed, he shall conclude, and if it be found &c. But otherwise if he shews matter which founds in bar; for then his conclusion shall be, and so my master is in without tort done; as if he pleads a *feoffment* of the plaintiff to a stranger, *que estate his master has*, or if he shews that his master recovered against the plaintiff. Kelw. 117. b. pl. 59. Casus incerti temporis.

40. The bailiff may plead an assignment of the land to his mistress, in name of her dower, or that his master had it by exchange, because in those cases, though the assignment or exchange lies not in his consuance, yet the entry by force thereof may be known en pais. Kelw. 117. b. pl. 59. Casus incerti temporis.

41. A bailiff shall plead no plea in delay of the assise to stay it, and therefore he cannot plead *jointenancy by deed*, for in such case process shall be made against the witnesses; nor shall he plead that the lands are *ancient demesne*, because it is not triable by the assise, but by the Book of Doomsday; but such pleas as are triable by the assise he shall plead, as well those which go in bar

as those that are dilatory. Kelw. 117. b. pl. 59. *Casus incerti temporis.*

42. As he may plead *feoffment of the plaintiff to a stranger que estate his master has*, because of this he may have notice by the livery made at the time; for feoffment is a thing lying in notice of the country, and so the bailiff may have consufance of it. Kelw. 117. b. pl. 59.

43. But he cannot plead a *release* of the plaintiff to his master, this being a thing not lying in notice of the country, and so by no common presumption lies in his notice; and so of a *warranty in a feoffment.* Kelw. 117. b. pl. 59. [ 225 ]

44. The words of the writ are, *attachias eum vel ballivum suum &c.* The bailiff pleaded in his own name thus, viz. *ƒ. de C. tanquam ballivus A. de B. dicit; and not A. de B. per ballivum suum.* 2 Inst. 415.

45. In an assise the bailiff *cannot plead any matter of record, either in bar or to the writ*; for the bailiff *cannot plead any matter or any plea out of the point of the assise*, nor any thing that is *not triable by the assise*, nor any plea which he cannot conclude, *et si trove ne soit, nul tort, nul disseisin.* And if therefore the bailiff does plead any matter of record, yet the justices shall proceed &c. and give judgment; but then the defendant named in the assise may come unto the justices, and verify that there was such a matter of record &c. and he shall have a certificate of assise by force of this act; and the writ that is given in this case is after judgment, but the certificate of assise that was at the common law was after verdict, and before or after judgment, when the verdict was not well examined by the justices &c. the justices *ex officio* might examine it. 2 Inst. 414 & 415.

46. A bailiff cannot plead *in bar.* Jenk. 225. pl. 83.

**(R. a)** What may be pleaded after Plea pleaded by Bailiff.

1. **A**SSISE *against C. and another, who pleaded to the assise by bailiff, which remained for default of the jurors, and came C. in proper person, and as tenant was received to plead in bar, by the release with warranty of the ancestor of the plaintiff, for by this release he may have certification, and this to avoid circuitry, for frustra fit per plura quod fieri potest per pauciora.* And itinere bedd. the tenant did it at the same day &c. by which the plaintiff said that C. who pleaded had nothing, but R. was tenant; and at this day all made default except C. and C. said that R. held for life, the reversion to him, and prayed to be received, and was received, because the plaintiff refused him to be tenant, to which C. now agreed by this plea; and now C. pleaded in bar as assignee of R. by charter of feoffment with warranty of ƒ. of H. ancestor of the plaintiff, and was received to do it notwithstanding his first plea by the release in his seisin, for here is other tenancy by the rescit and concord. P. 14 E. 2. Where a man pleaded to the assise, and after was vouched to warranty, and pleaded in bar as tenant by the warranty,

warranty, and was received, quod nota bene. Br. Assise, pl. 163. cites 11 Ass. 3.

\* S. P. pl.  
415. cite  
M. 12 E. 3.  
and Fitzh.  
Assise, 116.

2. Note per Green in assise against 2, the one pleaded nul tort by bailiff, the other pleaded a fine in bar, the \* defendant who pleaded by bailiff came in person the same day, and pleaded in bar, and well admitted at York, for the inconvenience of circuitry of action; for otherwise he shall have certificate of assise after, quod non negatur. Br. Assise, pl. 226. cites 20 Ass. 6.

Br. Baillie,  
pl. 21. (bis)  
cites S. C.

3. Assise against 2, the one pleaded that he is vellein of T. N. and the other by bailiff pleaded to the assise; the plaintiff chose him who pleaded by bailiff for tenant, and prayed the assise, by which he came and pleaded in bar, and was suffered the same day. Br. Assise, pl. 232. cites 22 Ass. 7.

4. In assise one was permitted to plead by bailiff, that the land was seised into the hands of the king for alienation without licence, and so &c. nul tort, quod nota. The plea not acknowledging the bailiff shall not grieve the tenant; but that he may say the contrary when he comes, as it is said. Br. Baillie, pl. 21. (bis) cites 22 Ass. 5.

[ 226 ] 5. Assise against 2, the one pleaded a recovery as tenant, which was denied, and failed at the day, and the other pleaded to the assise by bailiff, and the assise was awarded of the right of damages, and remained to be taken in pais, and the assise charged of the force and arms for the King; and then came the other in person, who had pleaded by bailiff, and pleaded record in bar, taking the tenancy, and then the plaintiff offered to release his damages, and prayed seisin of the land, but had it not, but the assise was awarded in right of the damages, and the other was ousted of his plea, and by the reporter it shall be enquired of the seisin with force, which was the cause that the plaintiff had not his prayer. Br. Assise, pl. 249. cites 23 Ass. 3.

6. In assise, the tenant pleaded to the assise by bailiff, and diverse were sworn, and the tenant came in person, and tendered to plead in bar by release, and was not suffered, and the same law where the assise is awarded, though no jurors are sworn. Br. Assise, pl. 293. cites 26 Ass. 18. (but should be) 29 Ass. 18.

7. Assise against 3, 2 appeared, and the 3d made default, but one appeared for him as bailiff, and came the party himself, and said that he is the same person, and disavowed him for his bailiff, and said that it was not his will that he nor any other should answer for him in this assise, neither would he himself appear nor answer &c. and it was admitted by all that he may disavow the bailiff well enough, quod nota. Br. Baillie, pl. 6. cites 8 H. 6. 7.

As he may  
plead re-  
lease in bar;  
for this is  
matter of  
certificate.

Br. Assise, pl. 415. cites M. 12 E. 3. and Fitzh. Assise, 116.

8. Where bailiff pleads to the assise, the tenant may come the same day, or another day before the assise taken, and plead in person matter in bar, whereof [lies] certificate in assise. Br. Assise, pl. 383. cites 9 H. 7. 24.

Assise  
against H.  
and two

9. And if assise be taken by default which remains till another day, if it be not entered of record that the tenant said nothing in arrest of

of the assise, then at the day the tenant may plead in bar at large ; *infants, all pleaded to the assise by bailiff*  
 quære &c. Br. Ass. pl. 383. cites 9 H. 7. 24.

which remained, and at the day the two came in person, and would have vouched H. who was ready to enter, but not received ; the reason seems to be, in as much as voucher is not a thing of which he may have certificate as recovery, fine, release &c. Br. Assise, pl. 426. cites 8 E. 3. 39.

For he shall not have other matter in \* person after he has pleaded by bailiff, but only that of which certificate lies, by which they pleaded a release ; quod nota. Ibid.

\* Nor by at torney, but only that which lies in certificate, per Brown, quod nemo dedixit. Br. Baillie, pl. 8. cites 22 H. 6. 44.

## (S. a) How to be pleaded:

1. **I**N assise, the tenant in dower pleaded in bar by fine levied by the ancestor whose heir &c. to the baron of the feme, of whose dowment &c. and shewed part of the fine, and held a good bar, and the plaintiff averred that the defendant seised him, absque hoc that she had any thing in dower ; and it was said, that she shall not have the assise without answering to the fine. Quære. Br. Assise, pl. 162. cites 11 Ass. 2.

2. In assise of rent, per Cur. plaint of rent-services shall be cum pertinentiis, and contra it seems of other rents ; and if the defendant makes default, the plaintiff shall shew what rent he demands. Br. Assise, pl. 185. cites 12 Ass. 41. and so he did anno 15 Ass. 4. Quod nota bene. [ 227 ]

3. In assise, the deed of the son of the cousin of the plaintiff of the part of his mother was pleaded in bar, and he was cousin, viz. son of A. son of J. brother to the mother of the plaintiff, and by common opinion it was a good bar ; quod nota. Br. Assise, pl. 265. cites 26 Ass. 34.

4. In assise it is a good bar for the tenant to convey himself to be tenant by the curtesy, the reversion to the plaintiff as heir of the feme of the defendant who is dead, by whom he had issue. Br. Assise, pl. 272. cites 27 Ass. 31.

5. If the tenant pleads recovery against the father of the plaintiff, and he makes title that his father was seised, this is not good ; for he does not shew what time, and then it shall be intended that it was pending the writ, or before execution, which is no matter. Br. Assise, pl. 282. cites 28 Ass. 17.

6. In assise, the tenant made bar, and the plaintiff made title, to which the tenant said nothing ; and the conclusion of the title was, et hoc petit quod inquiratur per assisam, and the tenant the like, and therefore ill ; for the tenant ought to have maintained his bar, and have traversed or confessed, and avoided the title. Ibid.

7. In assise, the defendant said, that he had nothing but in right of his wife not named &c. and if &c. nul tort, and the jury found verdict at large ; and the opinion of the Court was against the plaintiff, but adjournatur, &c. Br. Assise, pl. 20. cites 44 E. 3. 8.

8. In assise, the tenant said, that at another time he recovered the same land against J. N. by writ of dower by petit cape by default of the tenant after appearance, and the estate of the plaintiff mejne  
 VOL. III. S between

between the date of the writ and his recovery, judgment if assise, and a good plea, but she was compelled to shew the date of the writ, and so she did; for by Finch, if she mistakes the date, the plaintiff may say *nul tiel record*; quod nota; and the plaintiff said, that nient comprise, Prist, and so to issue, and process was made against the summoners in the first original, and the veiers in the writ of view, and the summoners in the petit cape, without mention of any pernors; for it is said there by all the clerks, and per Cur. that pernors shall be in the grand cape, but not in the petit cape, and the assise was demanded, and yet this issue shall not be tried by them, but it is to the intent to amerce them if they will not come; per the Reporter; and the same law where the parties plead to demurrer, and the assise is adjourned, yet the assise shall be demanded; and the same law at every day of adjournment, and yet if they appear they shall not be taken; quod nota. Br. Assise, pl. 34. cites 48 E. 3. 11.

9. Assise by 2 against 3, the one took the tenancy; as to the moiety of the manor which belonged to T. the one of the plaintiffs pleaded a fine of the mother of the plaintiff with warranty to W. whose estate he has, and demanded judgment for the moiety, and yet the fine was of the whole, and of the other moiety pleaded a release of the father of the same plaintiff with warranty to W. in fee, whose estate he has, and demanded judgment of this other moiety of assise, and the release was of the whole, and so the one and the other a bar of the entire, and yet it is pleaded and concluded but to the moiety, and well, and not double, by all the justices except Prisot, by which the plaintiff imparled, and after made title to the bars as they were; quod nota; and per Moile, where one pleads in bar in assise, and does not take the tenancy upon him, the plaintiff may pray the assise for nihil dicit, and this it seems where a number as 2 or 3 defendants are named in the assise; contrary it seems in assise against one, for there no other tenant can be but him, but in the other case some may be disseisors and some tenants. Br. Assise, pl. 99. cites 37 H. 6. 23. 24.

[ 228 ] (T. a) Pleadings. Where there is an Alteration of the Tenancy, pending the Writ.

1. IN assise, the tenant pleaded jointenancy to the writ, and the plaintiff confessed and avoided it, for it was made pending the writ, and there it is said, that process upon the statute shall not be, but where the deed is denied, and not where it is confessed and avoided. Br. Assise, pl. 128. cites 7 Ass. 20.

2. Note, that one defendant who was tenant demised himself to the other pending the writ, which matter was pleaded by the plaintiff, and the assise prayed; & non allocatur; for Herle said, that he would hold the tenement to be in the same plight that it was when he pleaded; but Wilby did contrary at Nott. & sic vide inde, and Brooke says he thinks, that if the tenant demises  
2  
pending



pending the writ, and before plea by him pleaded, that yet he ought to answer as tenant, and so it appears here ante. Br. Affise, pl. 144. cites 9 Aff. 11.

3. In affise, if the tenant aliens pending the writ, yet he may plead jointenancy with another, for he remains tenant to the affise, notwithstanding his alienation. Br. Brief, pl. 450. cites 12 Aff. 41.

4. In affise, he who had aliened, pending the writ, pleaded in bar, and this was challenged, but because he was tenant in law, the plaintiff was compelled to answer to him. Br. Affise, pl. 185. cites 12 Aff. 41. and t. 9 E. 3. accordingly.

5. And he who aliens, pending the writ, may plead jointenancy by deed, and the plaintiff shall be compelled to answer to it, wherefore he said that he was sole tenant &c. and writ issued upon the statute of conjunctim feoffatis. Ibid. and cites P. 21. and T. 21 E. 3. accordingly.

(U. a) Pleas good. Where several Pleas are pleaded by the same person, or by several Attornies, for one and the same Defendant.

1. **A**SSISE against A. and B. and A. as tenant pleaded release, and B. by attorney pleaded to the writ, upon which they were adjourned into Bank &c. where B. appeared by another attorney, and said that he is ready to hear the recognizance of affise, and the counsel of B. shewed this matter to the Court, and prayed his first plea pleaded in pais, which is more for the profit of his master; & non allocatur; for the Court recorded that he is attorney, and he does not say any thing by which the affise was awarded, and though there be another attorney, we have no regard to that; per Shard. And per Thorpe, if the one attorney renders the land, and the other makes defence, or if the one confesses the release, and the other denies it, you shall take the best plea for his master; but per Shard, these are not alike, and the affise was remanded of the whole &c. Br. Office del &c. pl. 24. cites 19 Aff. 10.

2. In affise the tenant had 2 attornies by several warrants, the one pleaded in bar, and the other to the affise, and the plea to the affise was accepted, and the other refused; for where the tenant himself pleads bar, and also general issue, the bar is waved by the general issue, and those attornies are as the party himself, Br. Barre, pl. 94. cites 20 E. 3. and Fitzh. Affise, 120.

(W. a) What shall be said Pleas to the Affise. [ 229 ]

1. **A**SSISE of rent, it is found that all the tertenant are not named, this is not material, if it be not pleaded by the defendant; for otherwise it cannot be found, and the tertenant may  
S 2 plead

*plead it ; but a pernor cannot plead it, by the opinion of the Court.* Br. Assise, pl. 396. cites 22 H. 6. 23.

2. Where assise is brought against *tertenant in fact*, who says that, no tenant of the franktenement named, this is to the assise, and the plaintiff need not maintain his writ. Br. Assise, pl. 399. cites 30 H. 6. 1.

3. *Contra where the assise is brought against pernor of the profits*, and he says that, no tenant of the franktenement named, there the plaintiff must maintain his writ. Quod nota diversify. Ibid. and cites Fitzh. Assise, 15.

### (X. a) Where the Plea is waved.

1. **A MAN** pleads to the assise, and after was vouched to warranty, and pleaded in bar as tenant by the warranty, and was received. Quod nota bene. Br. Assise, pl. 163. cites Pasch. 14 E. 2.

And note that in all cases where the tenant pleads in bar in assise, and after waves

it, Parn. said that he ought to take the assise in right of damages, as if the bar had been traversed and found false; but it was said that the verdict shall abate the writ, if the plea of the tenant be found that the land is in another vill; but at this day a man may \* wave his bar, and plead the general issue, but not plead to the writ after bar, ut supra. Br. Assise, pl. 107. cites 1 Ass. 17.

\* Br. Assise, pl. 368. cites 44 Ass. 1.

3. An infant in assise pleaded outlawry of felony in bar, and at another day was suffered to plead the release of the plaintiff. Br. Assise, pl. 196. cites 14 Ass. 15.

4. In assise of rent against 2, the one pleaded to the assise, and the other pleaded a recovery in assise of other lands and damages, and that he had execution by elegit of the land put in view for the damages, and so answered as tenant of this estate, and pleaded hors de son fee. The plaintiff elected the other for tenant, and demurred upon him who pleaded the record, and well, by the opinion of the Court; and at another day he who pleaded the recovery said, that the plaintiff himself was seised of the franktenement the day of the writ purchased, and yet is; upon which the assise was taken, and so fee that disseisor shall have this plea. Br. Assise, pl. 288. cites 28 Ass. 41.

5. In assise by 2 coparceners, the one of full age, the other an infant, against the 3d coparcener, who pleaded partition in bar against the one of full age, and to the assise against the other within age; and because he pleaded in bar against the one, and to the assise against the other, by this he has waved his bar; quod nota, wherefore he pleaded the partition in bar against both, and the others made title, and traversed the partition. Quod nota. Br. Assise, pl. 310. cites 30 Ass. 7.

6. Assise against an infant who pleaded a record, and failed at the day, yet he may plead other matter. Br. Assise, pl. 460. [ 230 ]  
cites 36 E. 3.

7. In assise the tenant pleaded a lease for life made by G. to his father, whose heir &c. which G. after released with warranty to the father and his heirs, and gave colour to the plaintiff, the plaintiff claiming by feoffment of the heir of G. after, and because the tenant claimed by the heir of G. who made the lease and release, the plaintiff said that the father of the tenant had nothing but for life; & non allocatur, by which he said that he had nothing but for life, absque hoc that he released &c. et non allocatur, by which he said that G. did not release by the deed, Prist; and the other contra. Br. Assise, pl. 347. cites 37 Ass. 16.

8. In assise of rent the defendant pleaded grant of rent to him for ten years with warranty by A. uncle of the plaintiff, whose heir he is, and so the franktenement in the plaintiff; judgment if he ought to have assise during the term. Persey said he never had such uncle, by which the defendant waved his plea, and pleaded nul tort; and so it is used at this day that the defendant may \* wave his bar, and take the general issue. Br. Assise, pl. 368. cites 44 Ass. 1.

\* Br. Assise,  
pl. 107.  
cites 1 Assise,  
17.  
S. P.

9. In assise against divers, where 2 take the entire tenancy, and plead to the writ, if the plaintiff replies that one of them is tenant, and that the other has nothing, he who is tenant shall not plead de novo as sole tenant. Thel. Dig. 90. lib. 10. cap. 1. f. 34. cites 21 H. 6. 63.

10. In assise the tenant said that the land is in another vill, and if &c. no tenant of the franktenement named, and if &c. nul tort. And per Cur. the first plea destroys the 2d; for none shall say that the land is in another vill but the tenant, and therefore by this he has taken the tenancy, so that he cannot say, no tenant of the franktenement named &c. For this is quod nota, by which he said that, no tenant of the franktenement is named &c. and relinquished the first plea. Br. Assise, pl. 399. cites 30 H. 6. 1.

11. In assise, the defendant had pleaded in bar which remained for want of view, and after the view was made, and he came and waved his plea, and pleaded to the assise, and it was accepted and entered; quod nota. Br. Assise, pl. 402. cites 34 H. 6. 10. and Fitzh. Assise, 20.

### (Y. a) Replication.

1. ASSISE of tenements in D. the tenant said, that he brought assise of the same tenements in R. against the plaintiff, and this land put in view &c. and he recovered; judgment &c. the plaintiff said that this is no plea, because the tenements are in divers vills, and prayed assise, & non allocatur, in as much as he says that those tenements were put in view, by which the plaintiff said, that they are not the same tenements &c. per Cur. this amounts to nient comprise, by which the tenant said, that, comprised, Prist, and the others

\* All the editions cite 4 Aff. 19. but there are not so many pleas there, but it seems misprinted for 44 Aff. pl. 19.

others e contra, and the entry was, not in view, and so, not comprised, and the others that, put in view, and so comprised. Br. Trials, pl. 123. cites \* 4 Aff. 19.

2. In assise, the tenant pleaded a feoffment of the grandfather of the plaintiff whose heir he is with warranty; the plaintiff said, that the grandfather was seised, and died seised, and he entered and was seised and disseised; and well, without shewing how he came by it after; quod nota, per Cur. Br. Assise, pl. 450. cites 9 E. 3. and Fitzh. Assise, 155.

[ 231 ] 3. In assise against several, one pleaded as tenant, and said, that the plaintiff had a writ of entry ad terminum qui præterit pending against him of the same land &c. to which the plaintiff replied, that he who pleaded the plea was not tenant, but another who had pleaded to the assise &c. And it was held a good replication, because the writ of entry was of elder date than the writ of assise. But otherwise it should be if it was of later date. Thel. Dig. 194. lib. 13. cap. 2. f. 4. cites 23 Aff. 14. and 45 E. 3. 24.

4. Assise against three, the one pleaded that there was no such in rerum natura as another named in the writ, and pleaded over to the assise, and therefore the Court did not compel the plaintiff to reply, because the defendant pleaded over to the assise, and therefore need not reply to it, and after the Court discharged the assise, of this plea no such in rerum natura; for it cannot be tried; for to say that there is such a one is not good. Br. Assise, pl. 87. cites 24 E. 3. 26. 49. 50.

5. Where P. is named as tenant of the rent, and the defendant said that W. is tenant and pernor of the rent not named; judgment of the writ, and if &c. the other may maintain his writ, and so he did, that P. is tenant, absque hoc that W. was tenant &c. there the assise shall be awarded to enquire of it, and further of the seisin and disseisin. Br. Assise, pl. 309. cites 30 Aff. 5.

6. Assise by baron and feme against S. of 40l. rent, the tenant said, that the land was out of their fee; judgment if without specialty assise, and was compelled to shew the quantity of the land, and said, that it was the 3d part of the moiety of the manor of D. The plaintiff said, that N. was seised in fee, and espoused the feme plaintiff, and died, and the tenant as heir to him endowed the plaintiff of the 3d part, and after she leased it to the defendant for the life of the plaintiff, rendering 40l. for the first year, and 10l. for the rest, and shewed deed, and prayed the assise. The defendant said, that part of the land was in another county; judgment of the writ, and upon this at issue whether it was in two counties or in one. Br. Assise, pl. 47. cites 7 H. 4. 29. 30.

7. Assise of rent, the tenant said that the land put in view is an acre &c. the plaintiff may say that it is a house. Br. Assise, pl. 497. cites 2 H. 7. 4.

8. If a man appears as bailiff in assise, the plaintiff shall not have any thing to say that he is not bailiff of the defendant, per Townshend; quod nemo negavit. Br. Assise, pl. 86. cites 15 H. 7. 17.

9. In

9. In assise, if the tenant pleads bar and gives title to the plaintiff, and destroys the same title, there it suffices for the plaintiff to maintain the same title, without more. Br. Titles, pl. 38. cites 3 E. 4. 18. As where the tenant says that he was seised till by D. disseised

who infeoffed the plaintiff upon whom he entered, it suffices for the plaintiff to say that D. did not disseise the plaintiff without more. Br. Titles, pl. 38. cites 3 E. 4. 18.

So if the defendant pleads recovery against a stranger, and the title of the plaintiff mesne, it suffices for the plaintiff to say that, nul tiel record. Ibid.

So it seems upon estate upon condition &c. Ibid.

But if the defendant makes bar, and gives colour to the plaintiff, and no title in fact, there by several the plaintiff ought to make title; for he cannot traverse the bar without making title, but by several he may say that, passa by the deed; but in this case 9 E. 4. some were contrary to the other of the justices. Ibid.

10. If in an assise against two each takes the entire tenancy and pleads in bar, and the demandant shews how they are jointenants &c. yet the opinion of Keeble was, that he must answer to the bars, because it appears to the Court, that each of them is tenant of a moiety, for which he may well answer, and then when he has pleaded for the whole his bar shall not be taken to be void as to the whole, but for his own moiety good, and for the other void. Kelw. 117. a. pl. 58. Casus incerti temporis.

## (Z. a) Replication. Title therein.

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1. ASSISE against two, the one pleaded to the assise, and the other in bar by deed of feoffment of the grandfather of the plaintiff with warranty as assignee, and shewed both deeds; the plaintiff said, not confessing the deed, that his grandfather was seised of fee and right, and died seised, and he entered as heir, &c. and was seised &c. and a good title without shewing how he came to it after &c. Br. Assise, pl. 144. cites 9 Aff. 11.

2. Assise against two, the one pleaded a release of all actions personal, without taking the tenancy, and the other pleaded jointenancy with a stranger not named to the writ, and the plaintiff chose him who pleaded the release for his tenant, by which the assise was awarded to enquire of the tenancy, and found that he who pleaded jointenancy had nothing, and that he who pleaded the release was tenant, and upon this he pleaded the release ut supra without taking the tenancy, and found for the plaintiff, and he recovered; and so see the assise once awarded upon the tenancy, and after upon the matter; and if the plaintiff replies to the release that after this he was seised and disseised, and found for him, he shall recover without making title; and because he who pleaded the release did not take the tenancy, nor plead any thing to the right but a release of actions personal, therefore the judgment was affirmed in a writ of error. 19 E. 3. 3. and so see that the plaintiff did not reply here till the tenancy was enquired; quod nota. Br. Assise, pl. 215. cites 17 Aff. 25.

3. If I bring assise, and the tenant pleads in bar, and I make title that it was found by office that my father was seised and died,

and held of the King, and I sued livery and entered; judgment &c. and pray the assise, the title is not good, because he does not allege seisin in fact; for where he claims by his ancestor, he alleges seisin in fact, for the office is only for the King, and shall not serve the plaintiff for title; for it may be that the office is false; but contra where a man claims by the King as in mortdancestor; it suffices to say that it was found by office that the ancestor held of the King, and died seised, the heir within age, by which the King granted the ward to the defendant; judgment &c. for there he claims by the King, and the office suffices for the King; contra where he claims by the party. Br. Titles, pl. 39. cites 5 E. 4. 3.

4. In assise by Dean and Chapter of rent issuing out of 3 acres, the defendant answered as tenant of the franktenement of 2 acres, and as to any rent issuing out of one acre he pleaded jointenancy with J. N. of the feoffment of W. P. and if &c. nul tort &c. and to another acre that he had nothing in it the day of the writ purchased, nor ever after, and if found that it be not &c. nul tort &c. and to the 3d acre that the predecessor of the plaintiff was disseised, and none was seised after &c. et non allocatur; for dean and chapter shall have assise of disseisin done to the predecessor &c. and to the first plea the plaintiff maintained his writ that sole tenant &c. and to the other that tenant as the writ supposed &c. and so see where he shall maintain his writ &c. and see that he pleaded in a manner nontenure to the one acre, which is no plea in assise, as it is said often elsewhere, but shall say that, no tenant of the franktenement named in the writ. Br. Assise, pl. 490. cites 1 E. 5. 4.

So if the demandant replies that he was seised till by a

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Stranger disseised, who infeoffed the tenant, upon whom he entered, and was seised till &c.

5. If in assise the tenant pleads in bar that his father was seised, and died, and that he as son and heir entered, and gives colour to the demandant, he may reply that he himself was seised, till by the father of the tenant disseised, and that he made continual claim, and after the death of the father entered, and was seised till &c. and yet he founds his title upon his own possession. Kelw. 103. a. pl. 5. Casus incerti temporis.

But if the demandant had replied that after the feoffment a stranger was seised, and died seised, and conveyed the lands to himself, this had been a good title; for the descent binds every body, and it is not material

whether he that died seised came to the land by disseisin or otherways, because by the dying seised the entry of every man is tolled; per Keble, Arg. Ibid. — So if the demandant replies

6. In assise the tenant pleaded the feoffment of the demandant with warranty, and the demandant replies that after this feoffment a stranger was seised in fee, and infeoffed the demandant in fee, and so he was seised till by the tenant disseised. Keble argued that this is no good replication, without shewing how the stranger came to this land; for it stands indifferent to the Court, whether the stranger came to the land by title or disseisin, and then it must be intended most strongly against him that pleads it; for when a man is in by right, as it is confessed the tenant was, it shall not be intended that the land is rightfully out of him, without shewing how, and the demandant cannot make his title at large, because the tenant in his bar has conveyed the land to himself by the demandant, and to this intent the title is not good. Kelw. 112. a. b. pl. 41. Casus incerti temporis.

that the King was entitled by office, and conveyed the lands to him; for every one is bound by the office; per Keble, Arg. Ibid.

But the reporter cites 38 H. 6. 2. in the end of the plea, and 28 H. 6. 5. in the end of the plea, and 9 H. 6. 4. S. P. contra.

## (A. b) Recovery upon other Title than set forth in the Count &c.

1. **I**N affise of rent the tenant made default, and it was demanded what rent it is, who said, rent-service. The affise said that the land was out of the fee and feigniory of the plaintiff, but he and those whose estate he has, have had rent out of that land time out of mind, and the plaintiff in aid of it shewed forth a deed, by which he purchased the rent, but no deed of commencement of it, and the plaintiff recovered by award; quod nota, notwithstanding that he said that he demanded rent-service, & nota bene. Br. Affise, pl. 188. cites 13 Aff. 4.

## (B. b) Judgment. And what recovered.

1. **A**SSISE by M. of the entire land, and because upon the pleading and demurrer upon it, it appeared that the plaintiff had title but to the moiety, and the tenant having title to the other moiety, it was awarded that the plaintiff shall recover but the moiety; quod nota. Br. Affise, pl. 493. cites 8 Aff. 33.

2. Affise of 20l. rent, and the tenant shewed deed, by which the plaintiff had leased to him by deed for life, rendering the rent, and as to 42s. shewed a release of the plaintiff, which was confessed, and yet the plaint shall not abate; for this does not go but in bar, as it seems, for this part; otherwise it seems of receipt of part pending the writ; and to the rest, he said that he himself, viz. the tenant for life, had brought affise against the plaintiff for disseisin done by him of the land now put in view, whereof &c. against the plaintiff his lessor, where it was found that the plaintiff his lessor had disseised him, by which it was awarded that the lessee recover seisin &c. and the jury gave the less in damages by reason of the rent reserved upon the lease, and recouped the damages for the time that the lessor was tenant by disseisin, and for his time he is served of his rent, and demanded judgment as to this parcel &c. and for the rent due after the recovery, he said that he had been at all times ready to pay, and yet is, and tendered the money in Court; and the other averred that he had not been at all times ready &c. Per Herle, this is no plea, by which he awarded the affise, which says that the rent of one term was arrear before the disseisin of the land, and another term was arrear after the recovery in the affise, and the lessor distrained, and the lessee made rescous, and would not pay without acquittance to the damage &c. and they were compelled to sever the damages from the rent arrear before the recovery, and from the rent arrear after the recovery, and it was awarded that

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that he recover the rent of 2 terms, and damages 100s. and so note that the rent due before the disseisin was not lost by the disseisin. Br. Assise, pl. 141. cites 8 Aff. 37. and Trin. 4 E. 3. accordingly.

3. Assise against *A.* and others, and it was found that the baron was seized in fee, and infeoffed the plaintiff after that he had married *A.* the defendant, and the guardian assigned her dower, who was ready to be attendant to whom the Court should award, and the assise is brought against the heir and *A.* feme of the father, and it was awarded that the plaintiff recover 2 parts, and the feme retained the 3d part in dower; for she was no party to the disseisin, and the 3d part of the damages was recouped; quod nota. And it is said there in the end, that if abator or disseisor assigns dower, the feme shall plead in bar against the heir, if no covin was in her. Br. Assise, pl. 181. cites 12 Aff. 20.

4. In assise of the chapel of *B.* the plaintiff was of a house and 3 acres, with the appurtenances, and the case was, the plaintiff was in of the collation of *J. N.* who right had, and the defendant made suggestion to the King that it was of his patronage, and gained collation of him, and ousted the plaintiff, and he brought assise and recovered, and the value of a year also, which was passed after verdict; but Trin. 15. such judgment was reversed, because it was of damages after verdict; and also the plaintiff in his title made himself guardian, and not in the original. Br. Assise, pl. 187. cites 13 Aff. 2.

5. Assise of a place containing in length 40 foot, and in breadth 20 foot, and found for the plaintiff, by which the plaintiff recovered, and found no damages; for the place was amended by building, and well, and so no damages awarded. Br. Assise, pl. 194. cites 14 Aff. 13.

6. A deed of confirmation which makes the estate of the plaintiff, may be found by verdict at large, though the deed was not pleaded but given in evidence. Contra of a deed which does not make the estate, and is not pleaded, and the plaintiff recovered, and damages taxed by the jury, and damages taxed pending the writ. Br. Assise, pl. 219. cites 18 Aff. 3.

7. In assise the tenant pleaded release, bearing date in a foreign county, and the plaintiff denied it, and thereupon were adjourned into Bank, and at the day the tenant made default, whereupon the assise was awarded at large. Per Shard, if the deed had been found false, the plaintiff by releasing his damages might have judgment of the land, and the entry in the roll shall be, quod petens petit, quod non inquiratur de damnis, and not that he had released his damages &c. Fitzh. Assise, pl. 125. cites 22 E. 3. 4.

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The plaintiff recovered damages for a quarter incurred after the adjournment of the assise, viz. the rent of this quarter with his damages. Br. Assise, pl. 330. cites 31 Aff. 31.

8. In assise a prior plaintiff shall recover the arrears of his own time, and \* of the time of his predecessor, and of a term after the adjournment of the assise, for it was in assise of rent. Br. Assise, pl. 304. cites 29 Aff. 59.

of the assise, viz. the rent of this quarter with his damages. Br. Assise, pl. 330. cites



It was said for law, that in affise of rent the plaintiff may recover all the damages against the tenant, though he has not been tenant but one month, and the arrears by 20 years by the statute. *Quere* by what statute? It seems to be by the statute of Gloucester, 101. Br. Affise, pl. 10, cites 33 H. 6. 46.  
 \* S. P. Br. Affise, pl. 443.

9. By *affise of office cum pertinentiis*, he shall recover all that is appendant to it. Per Shard, this is true upon ancient title only, and not upon a new grant. Br. Affise, pl. 308. cites 30 Aff. 4.

10. In annuity a man recovered damages in affise to the value of the land, incurred pending the writ till judgment. Br. Affise, pl. 47. cites 7 H. 4. 16.

11. In trespass, if the termor for years is ousted, the lessor shall have affise, but not recover damages; for the termor has the possession, and only he is damaged; per Brian J. *Quod non negatur*. Br. Affise, pl. 83. cites 15 H. 7. 4.

12. The judgment is, *quod recuperet seisinam*. Arg. 10 Mod. 125.

### (C. b) Damages. Charged with Damages who, where there are several Occupiers &c.

1. **A**SSISE against several, it was found that the plaintiff was disseised by one named &c. Parle said, that the disseisor is not sufficient, and therefore prayed that the tenant answer the damages. Persey said this is no reason but for his own time, for it may be that the plaintiff has omitted others; but because the disseisor was not sufficient, therefore the plaintiff shall have judgment to recover the entire damages against the tenant; and it is said, that Green awarded in Kent, that where several were named who had the occupation, and none was sufficient but the tenant, therefore the tenant was charged of all the damages. Br. Affise, pl. 318. cites 31 Aff. 5.

For more of Affise in general, see *Disseisin*, *Entry*, *Port-dancestor*, *Montenure*, *Presentation*, and other proper titles.

## Attachment.

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### (A) How considered.

1. **A**N attachment is a *non omittas* in itself, and therefore the sheriff may break his house to take him; per Coke Ch. J. Roll. Rep. 336. Hill. 13 Jac. B. R. Briggs's Case.

2. An attachment *after a decree for dismissal*, is in nature of an execution at law, and a *general pardon* may pardon the contempt, but not the debt. Fin. R. 253. Trin. 28 Car. 2. *Bartram v. Dennet*.

On a motion for an attachment on an alias mandamus, Holt Ch. J. said, it had been sometimes granted, but not frequently, and that

there are two sorts of attachments upon a mandatory writ; the one entitles the party to his action for damages, and that must be on the pluries; and the other punishes the contempt, which may be on an alias. 12 Mod. 343. Pasch. 13 W. 3.

3. Upon a motion for an attachment for *not returning a mandamus*, Holt Ch. J. said, that an attachment in *Chancery* on an alias and pluries is returnable in this Court, and is *not merely for contempt*, but is really an action whereon the plaintiff shall *recover damages for the delay* in not executing the writ; and we have without reason gone on in imitation of Chancery. It is a contempt not to return the first mandamus; therefore let a return be made within a week. 12 Mod. 164. Hill. 9 W. 3. Anon.

4. Upon an attachment, the party is only to answer interrogatories, and if he can swear off the contempt, he is discharged; and ignorance of the law cannot be pleaded in justification of an act against law, but may be offered in mitigation, per Holt Ch. J. 12 Mod. 348. Pasch. 12 W. 3.

### (B) Of what Things.

1. **I**N debt, trespass &c. a man ought not to attach the defendant by the horse upon which he rides, where he has other goods by which he may make the attachment, and therefore it seems that if there be no other goods, that then the officer may attach him by the same horse on which he rides. Br. Attachment, pl. 23. cites F. N. B. 93. (H) (J).

2. A single thing only ought to be attached; per Powell J. And per Treby Ch. J. it ought to be a *reasonable distress* to compel the defendant to appear. 2 Lutw. 1457. Hill. 9 W. 3. Hardgrave v. Ward.

t cannot be  
If corn out  
of sacks, but  
if it might,  
'tis to be kept  
by the bai-

liff, and he ought not to deliver them out of his hand to the plaintiff. Cro. E. 230. pl. 20. Pasch, 33 Eliz. 3. B. R. Mead v. Bigott.—3 Le. 236. S. C.

3. *Goods distrained or impounded* cannot be attached. Cro. E. 691. pl. 28. Trin. 41 Eliz. C. B. in Case of Humphrey v. Barns.

### (C) Forfeiture of the Goods &c. attached. In what [ 237 ] Cases.

1. **T**HE defendant justified, because the plaintiff was attached by writ, upon plaint in court baron, and made default at the day, by which the attachment is forfeited. Quære, for it is not adjudged. Br. Attachment, pl. 2. cites 28 H. 6. 9.

2. If defendant is returned attached in trespass by 20 sheep, or such like pretii &c. he is *essoigned* at the day, as he well may; and at the day makes default, he shall forfeit the attachment. Br. Forfeiture de Terres, pl. 3. cites 34 H. 6. 9.

Br. Attachment, pl. 3. cites S. C.—Note per Billing, Wang, and Nedham, goods may be attached by process out of court baron, and if the defendant does not appear, the attachment is forfeited to the lord of

3. So if he had made default at the day of the return of the attachment, and had not been *essoigned*, quod nota; and per Ashton, if he appears at the day of the attachment, or at the day of *essoign* returned, he shall save the attachment, otherwise not. Br. Forfeiture de Terres, pl. 3. cites 34 H. 6. 29. But nota, there the case in the margin, because by the *essoign* the goods were saved; therefore per Cur. writ issued to deliver the goods, and therefore they shall not be forfeited by default at the day of *essoign*, quod nota.

the manor. Br. Attachment, pl. 19. cites 34 H. 6. 49.—But it is said there that t. 37 H. 6. it was held by Ashton, Danby, Moyle, Davers, and Choke, that no goods attached shall be forfeited but in courts of record, and not upon justices in the county; but contra inde M. 32 H. 6. But this matter is not reported in 37 H. 6. and in the Case of the Priores of Rumney, there it was taken that the attachment in court baron shall be forfeited; for it is in vain to make an attachment, si nihil inde evenierit.—Br. Forfeiture de Terres, pl. 4. cites the same cases accordingly, and that by 32 H. 6. the attachment is forfeited before the sheriff or in justices; and says, that from hence it seems that it is forfeited, for the court of the sheriff is only a court baron.

4. Where the defendant is returned attached by such chattels upon writ of attachment, in debt &c. and at the day he is *essoigned*, and at the day of *essoign* adjourned the defendant makes default, yet the goods attached are saved, notwithstanding the default after; per Cur. and yet if he had made default at the day of the attachment returned, the goods had been clearly forfeited, quod nota &c. Br. Attachment, pl. 11. cites 21 E. 4. 78.

Br. Essoigne, pl. 138. cites S. C.

5. In

Br. Forfeiture, pl. 2. cites S. C. Br. Trespas, pl. 283. cites S. C. & S. P. accordingly; but where he attaches

it, and leaves the goods with the defendant, there he hath nothing to do with the goods attached, till default be made at the day.

5. In trespass, if the sheriff attaches a cow, the property is not out of the defendant till he has made default, and if the sheriff attaches the cow, and leaves the cow with the defendant, yet if he makes default at the day, the cow is forfeited, and the sheriff may take it, and might have taken the cow with him at first if he would, quod nota, per Cur. Br. Attachment, pl. 10. cites 9 H. 7. 6.

For more of Attachment in general, see *Assise (U)*, *Comprompt*, *Summons*, and other proper titles.

## (A) In what Cases.

Br. Escheat, pl. 23. cites S. C. It seems, that where judgment is not given there can be no attainder nor seizure of the land. Br. Forfeiture de Terres, pl. 28. cites † 4 Aff. 4.

1. A MAN seised of land had issue 2 sons, the eldest had issue a daughter, and did felony, and was taken and imprisoned, and became appellor, and after he prayed his clergy, and was retaken to prison, and there died; the father died, the daughter entered, and the youngest son who was uncle to the daughter ousted her, and she brought assise, and recovered by judgment; and so it seems that a man is not attainted by verdict nor confession without judgment; for there was a confession, but judgment wanting. Br. Assise, pl. 439. cites 8 E. 1. and Fitzh. Assise 421.

† Br. Forfeiture de Terres, pl. 28. cites 8 C. — Br. Corone, pl. 165. cites 20 E. 4. 5. S. P.

Upon attainder by utlawry, verdict, or confession, which are commonly said the three manners of attainder of felony, murder &c. judgment must be given upon every one of them, otherwise it shall not be said an attainder. Perk. S. 27.

An attainder is conviction of a person of a crime whereof he was not convicted before, for he cannot be twice attainted. Arg. Pl. C. 397. Earl of Leicester v. Heydon. — An indictment of treason is only an accusation, but an attainder is proof. Jenk. 243. pl. 26.

Every man attainted is convicted, but every man convicted is not attainted, for he that is attainted or adjudged is convicted and more, & ex vi termini, this extends to him that is condemned. 11 Rep. 60. in Dr. Foster's Case. — They are frequently used as synonymous &c. 2 Show. 382.

The difference between a man attainted and convicted is, that a man is said convicted before he has judgment, as if a man be convicted by confession, verdict, or recreancy; and when he has his judgment upon

upon the verdict, confession, or recreancy, or upon the outlawry or abjuration, then is he said to be attainted. Co. Litt. 39c. b. 391. a.

There are two sorts of attainders; the one is *after appearance*, and that in 3 manners; by *confession*, by *battle*, or by *verdict*; the other *upon process to be outlawed*, which is an *attainder in law*, Co. Litt. 39c. b.

## (B) Attainted Person. What he is capable of, and How protected and considered in Law.

1. A MAN attainted *cannot vouch*; if he should be allowed to vouch, he would be admitted to be a plaintiff or actor, whereas he is disabled to sue. Jenk. 209. pl. 43. cites 4 E. 4. 9. 6 E. 4. 4. and 8 E. 2. Fitzh. Voucher, 237.

2. Albeit judgment be given against a man in case of treason or felony, yet his body is not forfeited to the king, but until execution remains his own, and therefore if before execution he be *slain without authority of law*, his wife shall have an appeal; for notwithstanding the attainder he remained her husband, and after such attainder his body may at the suit of a subject be *taken in execution upon a judgment or statute &c.* and he may be executed for treason or felony, notwithstanding such execution had against him. 3 Inst. 215.

It is murder to kill an attainted person. Hawk. Pl. C. 80. cap. 31. f. 15. says it is agreed,

3. A man attainted of felony may be *sued for debt or trespass* during the attainder, but he cannot sue. Jenk. 209. pl. 43. cites 35 Eliz. Banister's Case.

Cro. E. 516. pl. 41. Mich. 38 & 39 Eliz. Banister v.

Trussel, S. C. where *debt* was brought on a *bond*, and the defendant pleaded that he was attainted; but by 3 J. contra Walmley, it was adjudged that he should answer. — 2 And. 38. pl. 25. S. C. and he was awarded to answer. — 3 Inst. 215. S. P. — S. P. per Cur. Sid. 160. in pl. 13. Mich. 15 Car. 2. B. R.

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4. If any *personal wrong* be done him during his attainder, when he is *pardoned* he may have *action* for it; per Anderson and 2 justices. Cro. E. 516. Mich. 38 & 39 Eliz. C. B. in Case of Banister v. Trussel.

5. A person attainted may *purchase*, but it shall be to the King's use. There can be no *restitution of blood* without act of parliament, but a *pardon* enables a man to purchase; and the son who is begotten after, tho' an elder be living, shall inherit those lands. Bacon's Use of the Law, 42.

S. P. admitted, Arg. 2 Le. 124. in Case of Venables v. Harris. — S. P. Arg. 10. Mod.

121. 359. in Case of Thornby and Fleetwood,

6. Land was devised to A. the *remainder to him that is next of blood*. Per Doderidge and Houghton J. the attainted person may take by this devise. 2 Roll Rep. 256. 257. Mich. 20 Jac. B. R. in the Case of Perin v. Pearse.

7. An attainted person, though *pardoned*, cannot take by *descent*; per Barkley J. Arg. Cro. C. 477. pl. 5. Trin. 13 Car. B. R.

If a person attainted be beaten or maimed, or a woman be

*ravished*, and are afterwards pardoned, they shall have action of battery, appeal of mayhem, or rape. 3 Inst. 215. cites Lib. Intrat. Co. 247, 248. — Arg. 10 Mod. 116. 361.

8. A

8. A person attainted may be challenged as a *juror*. Co. Litt. 158.

Jenk. 84.  
pl. 63. S.P.  
accordingly;  
for he is dead in law.

9. A person attainted of treason or felony cannot be an *approver*.  
2 Hawk. Pl. C. 205. cap. 24. f. 4.

10. A person attainted of treason or felony cannot bring appeal of death while the attainder is in force, though afterwards he may. 2 Hawk. Pl. C. 193. cap. 23. f. 128.

### (C) Forfeited by Attainder. What.

Br. Office  
devant &c.  
pl. 22. cites  
40 Aff. 24.

1. **W**HERE the King is entitled by office that *H. S. was seised in fee, and leased for life to J. H. and after H. S. was attainted of treason, and that J. H. is dead, and that M. is entered, by which scire facias is awarded against M. if he comes and says that J. H. was seised in fee, and died seised, and he is heir, this is no plea without entitling himself before the forfeiture, or shewing how H. S. dismissed himself, notwithstanding he traverses that H. S. had nothing at the time of the forfeiture.* Br. Scire Facias, pl. 158. cites 40 Aff. 24.

Contra if it  
be found by  
inquest of  
office; per  
Fortescue  
Ch. J. Note

2. If a man be *attainted of felony, and it is found by the same inquest that he has goods in the custody of W. N.* scire facias shall not issue. Br. Scire Facias, pl. 139. cites 36 H. 6. 26. per Fortescue Ch. J.

the difference. Brooke says the reason seems to be, inasmuch as it is not part of the one inquest, in whosesoever custody they are. Contra of the other inquest. Br. Scire Facias, pl. 139. cites 39 H. 6. 26.

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The King  
shall have  
the tempo-  
ralities in  
jure coronæ, not  
in jure vacationis;

3. If a *bishop* be attainted of treason, the attainder does not make the see void without deprivation. Jenk. 207. in pl. 37.

for he remains bishop till degradation or deprivation. Jenk. 210. pl. 44.

At common law a bishop, *prebend, dean, parson, or vicar*, who have an inheritance in *jure ecclesiæ*, forfeited their lands which they have in *jure ecclesiæ* only for their lives, in case of treason or felony. By the 26 H. 8. cap. 13. they forfeited the inheritance; by a statute made 5 E. 6. cap. 11. and a reasonable construction of it, the common law was restored as to these forfeitures. Jenk. 210. pl. 44.

4. If there be *lord, mesne, and tenant, and the mesne is attainted of felony, the lord paramount shall have this mesnalty presently; for this prerogative belonging to the King, extends only to the land which might be wasted, in lieu whereof the year and day was granted; and this is to be understood when a tenant in fee-simple is attainted; for when tenant in tail or tenant for life is attainted, there the King shall have the profits of the lands during the life of tenant in tail, or of the tenant for life.* 2 Inst. 37.

(D) Reversed. How, and by whom.

1. WHERE the party is to defeat the attainder of felony by error, there *scire facias* shall issue against the lords mediate and immediate &c. but not till the attainder be to be defeated; for where J. S. says that he is J. F. it shall not issue; for the attainder remains against J. S. Br. *Scire Facias*, pl. 132. cites 9 E. 4. 24. See tit. Utlawry. (S. b) pl. 12. and the notes there.

2. By 22 E. 3. and by all the books, if one be attainted of treason, no writ of error shall be brought of this without a petition before made unto the King to give his allowance unto this. 2dly, if one be attainted of treason, and executed for the same, no writ of error is to be brought of this at all, for the inconvenience that may happen; per Coke Ch. J. and he said that they cannot have a copy of the attainder; but if they can obtain leave of the King to prosecute this in this manner (by a Master of Requests) yet he said he would not grant this unto them before he had spoken with the King; for it is a dangerous thing, and if this course should be allowed of, all attainders might be searched into by writs of error, which is not to be suffered; and so per tot. Cur. the motion was denied, which was to have a copy of the attainder of his ancestor; per Coke Ch. J. 3 Bulst. 71. Trin. 13 Jac. The King v. Arden.

3. An executor being injured by an erroneous attainder, whether of treason or felony, may bring a writ of error; though by some it is necessary to *aver a personal estate*, for otherwise he is no ways damnified, whereas an heir is, though there is nothing descended to him because of the corruption of blood. Holt at first doubted, but afterwards all the Court agreed. Show. 13. Pasch. 1 W. & M. the \* King v. Ayliff and Freke. Godb. 380. Jones J. said, that Marth's Case, 8 Rep. 111. was never adjudged. \* 1 Salk. 295. pl. 1. S. C. held accordingly by three justices, but Holt Ch. J. doubted. — 3 Mod. 72. S. C. but S. P. does not appear. — Comb. 114. S. C. and the outlawry was reversed at the suit of the executor against the opinion of Holt Ch. J. — See tit. Utlawry (F. b) pl. 1. and the notes there.

4. Attainder of treason was reversed for want of the words *ipso vivente*, or *in conspectu ipsius* as to the *interiora comburentur*. 12 Mod. 95. Trin. 8 W. 3. the King v. Walcot. Comb. 369. S. C. the Court held the words essentially necessary. — Carth. 348. S. C. and judgment reversed after long debate. — 4 Mod. 395. S. C. and ibid. 402. says the judgment was reversed, and the reversal affirmed in the House of Lords, and cites Show. Parl. Cases 129. — 1 Salk. 632. pl. 4. S. C. and judgment reversed unanimously upon solemn arguments. [ 241 ]

For more of Attainder in general, see Blood corrupted, Forfeiture, Utlawry, and other proper titles.

## Attaint.

Fol. 280.

(A) Upon *what Inquest* it lies. No Attaint lies upon an Inquest of Office.

[1. IN an action against *tenant in tail*, if he *makes default*, and he in the *reversion* prays to be received, supposing him to be *tenant for life*, which is counterpleaded, upon which they are at issue, and it is found against him in the *reversion*, and the same inquest taxes the damages against the lessee, no attaint lies upon this verdict, because the judgment against the lessee is given on the default, and so this is but an inquest of office for damages. Contra 39 E. 3. 8. b.]

• Br. Quod ei deforceat, pl. 8. cites S. C. but says quere inde, for it was adjourned.

[2. An attaint lies upon a verdict before the sheriff in a writ of enquiry of waste. \* 41 E. 3. 8. because by the statute the sheriff is judge in this. † 48 E. 3. 19. ‖ 2 H. 4. 3. b. 7 H. 4. 38. b. Contra ‡ 3 H. 6. 29.]

should have attaint, quod fuit negatum. but mentions not the reason.

† Br. Attaint, pl. 21. cites S. C. and Wishing held that defendant

‖ Br. Enquest, pl. 9. cites S. C. as to the first point

In waste it was said, that upon writ of enquiry of waste, if the defendant loses the land wasted, he may have quod ei deforceat, per Hank. Ad quod non fuit responsum; but Brooke says, the law is contrary; for there it was agreed per tot. Cur. that attaint lies, and the party may challenge, and therefore this is a recovery by verdict, and not by default, and then quod ei deforceat does not lie. Br. Quod ei deforceat, pl. 7. cites 2 H. 4. 2. But the challenge was denied 21 H. 6. But per Newton and Paston justices there, and Markham and Portington serjeants, attaint lies. — Br. Attaint, pl. 21. cites 2 H. 4. 2. S. P. accordingly. — Fitzh. Attaint, pl. 13. cites S. C. and per tot. Cur. attaint lies, because the sheriff is judge by commission.

‡ Br. Attaint, pl. 105. cites S. C. that Martin held attaint lies upon enquiry by default in writ of waste, because it is not inquest of office. — Fitzh. Attaint, pl. 63. cites S. C. that attaint lies; for it is more strong than an inquest of office; for if the inquest had found no waste the plaintiff should be barred, and so the judgment is given upon the verdict. — F. N. B. 107. (C) in the new notes there (c) says, that it was so agreed by Martyn, contra Babington; for by him it is more than an inquest of office, for that the judges are bound to render judgment according to the finding of the inquest, as in this case of waste; but on an inquest to enquire of damages, there it is only for information, and the Court may increase or diminish the damages, and cites 2 H. 4. 31. 43 E. 3. 19. Contra 7 H. 4. 38.

Where writ of enquiry of waste is awarded by default of the defendant, a man shall not have his challenges to the polls, and yet attaint lies; quod nota. Br. Attaint, pl. 39. cites 21 H. 6. 56. per Newton and Paston justices, and Martin and Portington serjeants.

Br. Enquest, pl. 9. cites S. C. & S. P. — Br. Attaint, pl. 22.

[3. [So] an attaint lies upon an inquest before the sheriff in a *re-diffesin*; for the sheriff is judge in this. \* H. 4. 3. b. Dubitatur. † 40 Aff. 23.]

cites 2 H. 4. 2. S. P. accordingly.

† Br. Attaint, pl. 79. cites S. C. and says the best opinion was, that it is only an inquest of office, and that attaint does not lie. — Br.

[ 242 ] Rediffesin, pl. 5. cites S. C. and S. P. accordingly. — Br. Attaint, pl. 1. cites 28 H. 8. 1. and says, nota, that it was admitted in a writ of rediffesin anno 18 H. 8. that attaint lies upon a re-



*disseisin*, but says, *Quere* inde, if it be more than an inquest of office.—The Court doubted if it lay; and Anderson seemed that it did not; and yet the Register, fol. 2c8. b. where such attaint was ordered, which book satisfied some of the justices, and some doubted.—An attaint will not lie upon a verdict in *redisseisin*. Jenk. 181. pl. 65.

[4. So [if] an issue of *nient comprise* be tried by the first jurors an attaint lies thereupon. 4 H. 6. 28. b.]

[5. But no attaint lies upon an *inquest of office*. \* 2 H. 4. 2. \* Br. Enquest, pl. 9. cites S. C. that it lies not where b. † 3 H. 6. 29. b. ‡ 19 H. 6. 8. 10 B. 21 E. 3. 57. ¶ 43 Aff. 23.]

It is to enquire for damages; for it is an inquest of office; and so of enquiry before the Escheator. — See the notes at pl. 1. † See pl. 2. and the notes. ‡ Br. Abridgment, pl. 7. cites S. C. & S. P.—Fitzh. Damage, pl. 24. cites S. C. & S. P. ¶ Br. Attaint, pl. 79. cites S. C.—Mo. 184. pl. 328. Mich. 26 Eliz. the Court cited the case of 2 H. 4. 3. b. where it is said, that upon verdict given in writ of enquiry of waste before the coroners attaint lies; but Meade declared that this book was not law.—S. P. resolved accordingly. 10 Rep. 119. a. Mich. 10 Jac. Cheyney's Case.—S. P. accordingly, 11 Rep. 6. a. Trin. 10 Jac. in Heydon's Case.—S. P. accordingly by Vaughan Ch. J. Vaugh. 153.

[6. No attaint lies upon a verdict given by 24 jurors as it does not lie upon a verdict in an attaint. 8 H. 4. 23. b.] Br. Attaint, pl. 26. cited S. C. & S. P.

[7. It does not lie upon a verdict given in an attaint for the thing of which the jury is attainted. 12 H. 6. 6.]

[8. But if they find any collateral matter besides the attaint, it lies thereupon, and they shall be attainted by 48. 12 H. 6. 6.]

[9. In writ of right, if the grand assise be taken upon the mere right no attaint lies thereupon. 12 H. 6. 6.]

[10. But if the issue be taken upon a collateral matter, and not upon the mere right, an attaint lies thereof. 12 H. 6. 6.] Where a jury finds a thing which is out of the

*Issue*, there the verdict for so much is void, because they are sworn to try the issue between the parties, so that whatsoever they try besides the issue is per non juratos, and therefore if that matter so tried is false, an attaint does not lie against them, for no party is grieved. Hob. 53. Trin. 13 Jac. C. B. in the Case of Foster v. Jackson.

[11. In an assise, if they are at issue upon the plea in bar, and that is found for the plaintiff, and it is enquired over of the seisin and disseisin, if the disseisin be found by a false verdict an attaint lies thereupon. 11 H. 4. 27.] Br. Attaint, pl. 27. cites 11 H. 4. 26. S. P. by Culpepper. — Fitzh.

Attaint, pl. 15. cites S. C.

[12. If a recovery be in a quare impedit by default, and a writ issues to the sheriff to enquire of the damages and plenarty, no attaint lies upon this inquest; for it is but an inquest of office. 11 H. 4. 80. b.] Br. Attaint, pl. 126. cites S. C. and by Hank. & non negatur, 4 points of the

that if the verdict does not find who presented last, or if they omit any other of the writ, they may be enquired by other writ of office, and attaint does no lie thereof.—Br. Enquest, pl. 44. cites S. C.

[13. But it seems it is otherwise if the enquiry be by the same inquest that enquired of the issue in the quare impedit (for as it seems this is all one with the enquiry in an assise). Contra Co. 10. Sheryf 119.]

\* Br. Attaint, pl. 67. cites S. C. but [ 243 ] 11 E. 3. Attaint 26. per Shard 3 E. 3. *Itinere North*, 50. per Clat.]  
 [14. If a deed with witnesses be pleaded, and the inquest passes in the affirmative, no attaint lies thereof. 12 H. 6. 6. because the witnesses have adjudged this to be true. \* 23 Aff. 11. per Thorpe  
 and the inquest cannot agree in verdict, the verdict of the inquest only shall be taken, and there attaint lies.——2 Inst. 662. S. P. accordingly.——F. N. B. 106. (H) S. P. accordingly.]

\* Br. Attaint, pl. 67. cites S. C. For a negative implies nothing.——F. N. B. 106. (H) For the witnesses cannot prove a negative; but of the affirmative they may have notice whether it be his deed or not.——2 Inst. 662. S. P. accordingly, and cites 11 Aff. 19. 22 Aff. 15. 23 Aff. 11. 40 Aff. 23. 11 H. 6. 6. and F. N. B. 106. (H) ‡ See page 9. of this volume.  
 [15. But otherwise it is if it passes in the negative and disaffirmance of the deed. 40 Aff. 23. per Fitzjohn; for the † witnesses ought to testify nothing but what they know certainly, scilicet, what they saw and heard. \* 23 Aff. 11. per Thorpe. Contra 11 E. 3. Attaint 26. per Shard.]

{ Fol. 281. [16. If a man be indicted of trespass, and found guilty by another inquest, he shall not have an attaint, nor petition in nature of an attaint, because he is in a manner found guilty by 24. 10 H. 4. Attaint 60. 64.]

Vaugh. 146. in Bulbell's Case, Vaughan Ch. J. cites S. C. and says, that there is no case in all the law of such an attaint, nor any opinion but that of Thirnings in this Case, for which there is no warrant in law, and thinks the law clear that an attaint did not lie.——2 Jo. 16. S. C. & S. P. by Vaughan Ch. J. in delivering the judgment of the Court.  
 [17. But if he be acquitted, the King shall have an attaint. 10 H. 4. Attaint 60. 64.]

\* S. P. Br. Attaint, pl. 102. cites F. N. B. London.  
 [18. If a man be indicted and found guilty of felony, and the execution respited for a certain cause, or he is delivered to the ordinary, he shall not have any attaint, because it is found by 24. Contra 10 H. 4. Attaint 60. 64.]  
 19. It was said that attaint does not lie upon assise for default; for it is only inquest of office where the disseisin never appears. Quære inde; for the book here vouched is not to this purpose, but is where an \* abbot recovered in assise against another, and the same inquest enquired of collusion, and found a thing false in law, and contrary in itself, yet the judgment was given, because this was not but inquest of office. Br. Attaint, pl. 112. cites 16 Aff. 1.

20. In assise, if issue be joined upon a release, and a mediate ouster confessed, there if the issue be found for the plaintiff, yet the jury shall enquire of the seisin and disseisin, being the point of the action, and thereon an attaint lies. 10 Rep. 118. Mich. 10 Jac. per Cur. in Cheyney's Case, cites 11 H. 4. 27. 34 H. 6. 32. b. 16 Aff. pl. 1. 16 E. 3. Attaint, pl. 41.]

21. In præcipe quod reddat by a prior, if the issue is found for the plaintiff, and the collusion found by the same inquest, as it ought &c.

&c. Attaint does not lie of the verdict of the collusion; for of this it is only inquest of office. Br. Attaint, pl. 8. cites 33 H. 6. 25.

22. In a writ *de valore maritagii* issue was joined upon the tenure, and found for the plaintiff, and damages to 40s. and costs to 20s. but the jury did not find the value of the marriage, which they ought to have done. It was resolved, that if they had found an excessive value, or excessive damages, an attaint lies. 10 Rep. 118. Mich. 10 Jac. Cheyne's Case.

S. P. admitted, Godb. 207. pl. 294. Mich. 11. Jac. C. B. in Cook's Case.

(A. 2) In what Cases or Actions.

[ 244 ]

1. 5 E. 3. cap. 7. ENACTS, that writs of attaint shall be granted as well upon pleas of trespass moved without writ, as by writ, before justices of record, if the damages adjudged do exceed 40s.

2. In attaint the tenant of the land would have rendered to the plaintiff, and the Court would not accept the render for the advantage of the King, but took the jury; and also land is not here in demand. Br. Attaint, pl. 50. cites 6 Aff. 2. 6 E. 3. 12.

3. In assise it was said that if witnesses are joined to the inquest, and agreed with them in verdict, attaint does not lie, for the 12 cannot be attainted, if the witnesses are not also attainted, and they shall not be attainted. Quære if this be the reason, or because now the verdict is by more than 12. Br. Attaint, pl. 57. cites 11 Aff. 19.

4. Attaint lies upon recovery by default in assise; and therefore it seems that quod ei deforceat does not lie upon such recovery by default; for it is by jury, and not properly by default. Br. Quod ei deforceat, pl. 14. cites 17 E. 3. Fitzh. tit. Attaint 69. and 21 H. 6. 61.

Br. Attaint, pl. 39. cites S. C.—Where inquest is awarded by default assise issue joined.

the party shall have attaint. Contra upon inquest of office; for there issue never was joined. Br. Attaint, pl. 9. cites 34 H. 6. 12.

5. 28 E. 3. cap. 8. An attaint shall be granted as well upon a bill of trespass as upon a writ of trespass, without having regard to the quantity of the damages.

6. Attaint was brought in B. R. upon assise of fresh force, and the record was made to come there; and so see that attaint shall be brought only where the record is. Br. Attaint, pl. 16. cites 44 Aff. 20.

7. Assise of fresh force was brought before mayor and bailiffs in a city, and thereupon attaint was brought, and exception was taken, that the statute gives attaint in plea before justices by writ or by bill; and this plea was before mayor and bailiffs in a city, and non allocatur; but the jury was awarded, and the plaintiff prayed nisi prius, and could not have it, for one of the petit jury was in Newgate, and came and pleaded, and was remanded, quod nota. Br. Attaint, pl. 16. cites 44 Aff. 20.

Br. Attaint, pl. 113. cites S. C. for those who have conscience of pleas, are the King's justices also, and attaint lies.

D. 207. a. Marg. pl. 64. says, that attaint does not lie upon suit by bill, and cites Tria. 3 H. 39 Rot. 90. Ex Libro Magistri Noy, and 44 E. 3. 2. b. by Knivet.

8. *Trespas in B. in the county of C. of trampling his grass, where in truth the trespass was done in P. in the county of S. if the defendant pleads not guilty (as he may) and the jury find him guilty in the county of S. the verdict is void, but if they say guilty generally, then attaint lies; for this shall be intended in the county of C. where the action is brought, and this was in trespass local of grass trampled, quod nota.* Br. Attaint, pl. 108. cites 4 H. 6. 63.

9. *In detinue, if the plaintiff and the garnishee are at issue, and at the nisi prius the garnishee makes default, judgment shall be given by his default, per Marten and tot. Cur. and the inquest shall not be taken upon the issue, for by the default the issue is waved; and the inquest shall enquire of the damages, and the garnishee shall not have attaint.* Br. Inquest, pl. 57. cites 8 H. 6. 5.

10. *If a man recovers by false verdict, and a stranger ousts the tenant, he shall not have attaint, unless he be ousted by the demandant who recovered, or his heir.* Br. Attaint, pl. 38. cites 21 H. 6. 55.

[ 245 ]

11. *And it was said there, that attaint lies in personal actions before execution sued.* Br. Attaint, pl. 9. cites 34 H. 6. 12.

Attaint was brought upon a verdict in appeal of Maibem, and the plaintiff was effoigned, and

12. *Attaint does not lie upon appeal of maibem, nor upon any other appeal, notwithstanding the statute of 34 E. 3. 7. for it is there recited, that it was agreed, Hill. 42 E. 3. in B. R. that attaint does not lie upon any appeal, for it is not properly within the words of the statute.* Br. Attaint, pl. 101. cites the Register, fol. 122.

it was doubted if the effoign lies or not; but it was not argued if the attaint lies or not. and therefore it seems that it is admitted there to lie, and quere if it does not lie at this day by the statute of 23 H. 8. 4. for it was doubted P. 38 H. 8. Br. Attaint, pl. 10. cites 34 H. 6. 36.—S. P. Br. Attaint, pl. 12. cites 35 H. 6. 30.

\* 6 Rep. 47. in Dowdal's Case, says that this conceit of Brooke was utterly denied, per tot. Cur. to be law.

13. *Note for law, where trespass of battery, goods carried away, or writing torn, be done in one county, yet action may be brought in another county, for those are not local; but contrary of trespass of trees cut, or grass trampled, those are local, and shall be brought in the proper county; but in the other cases, the jury of another county may take conufance thereof, but are not bound to it, but if they take conufance attaint does not lie.* Br. Attaint, pl. 104. cites M. 2. M. 1. and P. 18 E. 4. pl. 5. fol. 1. is to the same intent.

14. *Of a jury which is more than 12, attaint does not lie.* Br. Attaint, pl. 50.

S. P. Br. Damages, pl. 7. cites 3 H. 6.

15. *In assise, the disseisin is found to the damage of 9l. and the disseisor sows the land to the value of 10l. and yet the assise gives damage of 9l. Attaint lies per Cur. because the damages were not recouped in the verdict for the sowing.* Br. Attaint, pl. 125.

See (G) pl.

16. *Upon a verdict in information, no attaint lies.* Vide Br. Attaint, pl. 127.

17. It

17. It lies in an *assise of fresh force brought in London*. Goldsh.  
42. pl. 18. in *Case of Dicksey v. Spencer*, cites 44 E. 3. 32.  
18. It lies *only in civil cases*. 1 Hawk. Pl. C. cap. 72. §. 5.  
19. If in a *criminal case* the jury gives a hard verdict, no attaint  
lies; per Holt Ch. J. *Ld. Raym. Rep.* 469. Pasch. 11 W. 3.

(A. 3) By Common Law or Statute.

1. *WESTM.* 1. cap. 38. 3 E. 1. enacts that *attaints shall be granted ex officio upon inquests in plea of land, or of any thing touching freehold, when it shall seem necessary.*

The chief before this statute was, that though (as

the common opinion is) an attaint did lie upon a false verdict given in plea of land, yet the King many times would not grant it, without suit made to him; which turned the party grieved not only to great delay, but to extreme trouble, attendance and charges; and the reason that made the difference between the plea real and plea personal was, that in the plea personal the party grieved had no other remedy but the attaint; but in the plea real, he had other remedy in an action of higher nature, and for that cause was not granted without difficulty; and some judges held, that in a plea real an attaint did not lie, and therefore this act provided, that the King shall grant it ex officio, that is, ex merito iustitiz; and this act is holden to be in affirmance of the common law, and this is the common opinion agreeable with our old books, 2 Inst. 237.

2. The defendant shall not have attaint in *appeal of maihem*, no more than in *appeal of felony*; for the statute does not give it but in writ of trespass, per Thorpe J. but see 34 E. 3. cap. 7. Br. Attaint, pl. 66, cites 22 Aff. 82.

3. Attaint was never taken by equity upon any of the statutes [ 246 ] which give attaint; for first by *Westm.* 1. cap. 37. it was given in plea real, and there plea personal was not taken by the equity, and after it was given in plea personal, and this was taken of the principal and not of damages. Br. Attaint, pl. 42. cites 14 H. 7. 13. per Brian and Fineux, the two Ch. Justices, and Hody Ch. Baron.

Br. Parliament, pl. 20. cites S. C.

4. And after 1 E. 3. cap. 7. was given as well of the damages as of the principal. Ibid.

Br. Parliament, pl. 20. cites S. C.

5. And where attaint by the statute fails, as in a case arising in Lincoln, there he may have attaint by the like form as was at common law. Ibid, per Brian and Fineux.

6. So it seems that attaint was at common law, and this seems to be to reverse the first record; for the statute of *Westm.* 1. cap. 37. is, that the King of his office will give attaints in plea of land or franktenement, or thing which touches franktenement, and no penalty is there expressed which shall be forfeited by them. Ibid.

7. And it seems, that attaint was at common law in plea personal except trespass; for divers statutes give it in trespass, and the statute of 34 E. 3. 7. gives attaint as well in plea real as personal, so it seems that it was in plea personal before, for *Westm.* 1. cap. 37. gives it in plea of land as above, so it seems that there was none in this before, but it was in some plea before, for the penalty of the forfeiture of the petit jurors was at common law, as it seems; for no statute

It seems by our old books and ancient records, that by the common law it lay as well in plea real

as personal.  
2 Inst. 130.  
and cites a  
great many  
books.

The com-  
mon law  
gives at-  
taint in  
debt, cove-  
nant, or de-  
tinue, where  
the debt or  
damages  
exceed 40s.  
Jenk. 89.  
pl. 73.

statute makes mention of it, so *attaint was at common law* in some actions, and this seems to be *in debt, detinue, covenant &c.* and not in trespass, for it is given by statute in trespass; the reason seems to be, that it does not lie *in trespass at common law, because if the recovery should be reversed, the King shall lose his fine*, and the reason that it does not lie \* *in plea of land at common law* seems to be, *because if he loses he may have writ of right*, and if he loses *in writ of right, attaint does not lie by the common law, nor at this day, because it passes by grand assise*, which is more than by 12, for of a jury which is more than of 12 attaint does not lie, as appears elsewhere. Br. Attaint, pl. 42. cites 14 H. 7. 13. by the 2 Ch. Justices and Ch. Baron.

\* Jenk. 89. pl. 73. S. P.

Inquest was  
taken with-  
in the city of  
L. by those  
of the city  
before jus-  
tices of nisi  
prius, and  
by Fineux,  
Brian, and  
Hoddy, viz.

8. 13 R. 2. cap. 18. enacted, that *of false verdicts taken before the mayor and bailiffs of Lincoln, if attaint be sued it shall be tried by those of the county of L. and not by those of the vill of L.*

After which statute *Lincoln was made a county in itself*, and where they were *mayor and bailiffs, were made mayor and sheriff.*

And thereupon 3 H. 5. cap. 5. enacted, that the statute made 13 R. 2. should hold place as well as where they were *mayor and bailiffs.*

the two Ch. Justices, and the Ch. Baron, *attaint does not lie of those of the county of L. but of those of the vill of L.* for the statute by express words does not serve to take them of those of the county of L. because the petit jury was taken before the justices of nisi prius, and not before the mayor and sheriff of L. and by the equity it cannot be taken, because attaint is penal, and attainments never were taken by equity; and there it was agreed by Brian and Fineux, that where he cannot have this form of writ of attaint, he may have attaint, which was *at common law*. Brooke makes a quere what attaint it was, and says it seems to be attaint in plea of debt &c. Br. Parliament, pl. 20. cites 14 H. 7. 13. — Jenk. 186. pl. 82. cites S. C.

[ 247 ]

## (B) For what Cause.

As where  
feme takes  
baron, and  
after they  
are divorced,

[1. AN attaint does not lie for not finding a divorce, because that does not lie in their consuance, being a record. 7 H. 4. 23. adjudged.]

and she takes another baron, and she dies, in assise between her heir and the heir of the second baron, they find verdict at large, and find the first espousals but not the divorce, by which the plaintiff in the assise is barred, attaint does not lie; for they cannot take cognizance of the divorce, it not being pleaded nor given in evidence; quod nota. Br. Attaint, pl. 24. cites 7 H. 4. 23.

Br. Attaint,  
pl. 90. cites  
S. C. and S. P.

[2. No attaint lies for costs. 12 E. 4. 5. b.]

[3. In debt upon a contract in one county, where the contract was made in another, if the jury do not find this, but [find] against the plaintiff, no attaint lies. 4 H. 6. 2. b.]

Br. Attaint,  
pl. 68. cites  
S. C. says  
only that it  
it was said,  
that a re-

[4. In an assise, if the tenant pleads null tort &c. if a release, which passes the estate, be shewed in evidence by the plaintiff, and the jury does not find it, though it was not pleaded, yet an attaint lies, 26 Ass. 12.]

lease which was not shewn in evidence to the first jury shall not be given in evidence to the grand jury.

5. In

5. In trespass of battery in the county of S. per Prisot, if the battery was in the county of N. and the jury, upon not guilty pleaded, find the trespass, and the defendant guilty, attaint lies; for they cannot take consuance out of the county; but Ashton Justice contra, for the verdict is true, and they may take consuance if they will, but they are not bound to find it if it was in a foreign county. Br. Attaint, pl. 46. cites 39 H. 6. 8.

6. And where they find a deed which was before time of memory, this is good, and yet they are bound to do it, Ibid.

7. The plaintiff cannot have attaint for too little damages. Br. Attaint, pl. 86. cites 6 E. 4. 5.

But if damages are excessive  
attaint lies. Jenk. 24. pl. 46.

8. Debt against executors upon issue of *ne unques executor*, and the defendant gave in evidence gift of the testator of his goods in a foreign county, and that he left them in his custody till he died, and after he took them, absque hoc that he administered other goods &c. the jury is bound to find his gift upon pain of attaint. Br. Attaint, pl. 111. cites 9 E. 4. 40. per tot. Cur.

9. The attaint is not only to punish the jury, but to answer the party his damages. Br. Attaint, pl. 41. cites 14 H. 7. 5. per Cur.

(C) In what Court it lies.

[ 248 ]

[1.] IF a man recovers in an assise in Oxford, and after the record is removed in Bank, the attaint ought to be brought there, and in no other place, because the record is there. 21 E. 3. 10. b.]

because it was not brought where it passed, non allocatur.—Br. Attaint, pl. 31. cites 21 Aff. 7. S. P. that attaint shall be brought where the record remains, and not elsewhere.

But Br. Attaint, pl. 31. cites 21 E. 3. 3. contra, that where assise is adjourned into Bank for difficulty of the verdict, and judgment given there, if the defendant will have attaint, he shall have the record before the justices of assise again, and there he shall have attaint, but not in Bank where the judgment is given.

Attaint was brought in C. B. of a verdict given before justices of oyer and terminer, and so it seems that the record came there; for where the record remains, there attaint shall be brought. Br. Attaint, pl. 60. cites 16 Aff. 4.—A verdict and judgment given in the Exchequer was removed by certiorari into C. B. and attaint was there brought upon it. Mo. 17. pl. 60. Pasch. 3 Eliz. Austin v. Baker.—Bendl. 87. pl. 132. S. C. accordingly.—And. 24. pl. 53. S. C. but S. P. does not appear.—D. 201. pl. 65. S. C. but S. P. does not appear.

Attaint was brought in B. R. upon assise of fresh force, and the record was made to come there; and so see that attaint shall be brought only where the record is. Br. Attaint, pl. 16. cites 44 Aff. 20.

2. The record of an assise of fresh force was sent by writ out of Chancery to C. B. and attaint was brought on the record there. F. N. B. 107. (K) in the new notes there the last paragraph, cites 21 E. 3. 10. and says, see Dyer 81. and there it seems, that if issue be joined in C. B. on a matter triable in the county palatine, and it is there tried, and the record removed, that attaint lies here, and cites 19 H. 6. 53. and says, see Dyer 250. that attaint lies in C. B. on a record in B. R. sent by mittimus into C. B. and so on a verdict in the Exchequer.

3. In

3. In attaint the parties and the jury appeared, and demanded *oyer of the writ &c. and also of the record upon which the attaint was founded*, and had it in hæc verba; for the record was in the same Court of C. B. and thereupon the plaintiff assigned the false oath. The defendants *pleaded that they made a good and lawful oath*, upon which they were at issue; and afterwards the record was removed by a writ of error into B. R. and is yet pending there. It seems that notwithstanding it was thus removed, the Court of C. B. might proceed. Dyer 284. pl. 35. Trin. 11 Eliz. B. R. Anon.

### (D) For what Causes it lies.

Where affise is awarded at large upon the circumstances, and finds matter out of the point of affise, as to say that there was no tail of this land to the ancestor of the infant, which is false, yet the infant shall not have attaint; per Wych, because it is of the circumstance. Br. Attaint, pl. 128. cites the printed book of Abridgment of Assises, fol. 55.

[1. IF a jury find a special matter, which is not part of their charge, nor pertinent to the issue, no attaint lies for this. Co. 11. Priddle and Napper, 13.]

Fitz. Estoppel, pl. 1. cites S. C. & S. P. accordingly, by Caund.——Caveatur in every action triable by jury of the quantity of the land, as where a man demands 200 acres where they are but 160, or the like, and the title [249] is for the demandant, there if the jury find quod disseisinum of the 200 acres, or the like, this is matter of attaint. Br. Attaint, pl. 96. cites 24 H. 8.

[2. An attaint does not lie for a thing which is but surplusage. 40 E. 3. 38. b.]

[3. In an assise of mortdancestor, if the defendant pleads a feoffment in fee to him and the ancestor of the demandant, and that he survived the ancestor &c. and the demandant pleads that his ancestor died sole seised, and traverses the feoffment modo & forma, and the inquest finds that the feoffment was made to them in fee, though the joint estate is sufficient to abate the writ, without saying it was in fee, yet he is put to his attaint, and in this case he may have an attaint; for this will estop him to say the survivor had but for life. 46 E. 3. 8. F. Estoppel 199. per Curiam.]

Br. Attaint, pl. 82. cites S. C.——[4. An attaint does not lie for that which was not given in evidence. 43 Ass. 41.]

Br. Verdict, pl. 51. cites S. C.——See (B) pl. 1. and the note there.

Br. Verdict, pl. 51. cites S. C. but not S. P.——[5. In an assise, if the jury find a feoffment of land, if this was upon condition, they ought to find the condition, otherwise an attaint lies, though it was not pleaded; for this is incident upon the general issue, if it was given in evidence; but otherwise it is if the condition was not given in evidence. 43 Ass. 41.]

upon condition without deed, and enters for the condition broken, he shall not plead it without deed, but he may give it in evidence, and the jury is bound to find it in pain of attaint, and this if assise be thereof brought, and nul tort pleaded. Br. Attaint, pl. 119. cites 18 E. 4. 12. per Genney. Quod non negatur.

[6. If



[6. If the disseise enters upon the disseisor, and infeoffs the disseisor, and after brings an assise against the disseisor, if the seoffment be not pleaded, nor given in \* evidence, and the jury does not find it, yet no attaint lies. Contra 43 Aff. 41. because they ought to take notice of the livery.]

Br. Verdict,  
pl. 51. cites  
\* Fol. 282.

S. C. &  
S. P. but

says that the seoffment was not pleaded, but given in evidence, and that attaint lies; for the jury ought to take consufance of the livery of seisin. — Br. Attaint, pl. 82. cites S. C. and states it of the seoffment being given in evidence, but not pleaded; and the opinion there accordingly.

[7. [So] In an assise against a disseisor, who hath a release of the disseisee, if he doth not plead this, nor give it in evidence, if the jury do not find it, no attaint lies. 43 Aff. 41.]

Br. Verdict,  
pl. 51. cites  
S. C. and  
says that  
if he does

not plead it, he cannot give it in evidence, and the jury cannot take cognisance of it, and therefore attaint does not lie in such case. Br. Attaint, pl. 82. cites S. C. & S. P. accordingly; for of release not pleaded, lies certification of assise, and not attaint; for release cannot be given in evidence as a seoffment may.

8. Where a man has common appendant, and makes title as apurtenant, and it is found for him, attaint lies. Br. Attaint, pl. 89. cites 10 E. 4. 49 H. 6. 17. per Pigot.

9. And where a man has fee as forester, and prescribes in it without saying as forester, and it is found for him, attaint lies, and yet the matter is true, but has not expressed all; for he has no such rent, common, or fee as he alleges. Ibid.

So where  
abbot was  
parson im-  
parsonce  
time out of  
mind, and

he had annuity by prescription in right of his parsonage, and he as abbot, without naming himself parson, brought writ of annuity, and counted upon prescription in him and his predecessors abbots, and the prescription was traversed, and found with the plaintiff, there every word of the verdict is true, and yet attaint lies; for he claiming not as parson, they ought not to have found the issue with him. Pl. C. 291. b. 292. cites 49 H. 6. and M. 10 E. 4. 16.

10. So where they find the defendant guilty in trespass, or the like, of several trespasses which he did not do, or of excessive damages &c. Br. Attaint, pl. 96. cites 24 H. 8. [ 250 ]

11. In debt on bond for performance of covenants, one of which was, that in consideration the plaintiff would build a new mill upon the lands demised to him by the defendant, and bring a water-course to it, he the said defendant leased the said land to the plaintiff, and the plaintiff assigned the breach in stopping the water-course; upon which they were at issue, and found for the plaintiff. The defendant brought an attaint, and the false oath was found. It was moved in arrest of judgment that here was no issue, and consequently no verdict, and so no false oath, and then no cause of attaint; for the issue was upon the stopping the water-course, which is no cause of action upon the party's own shewing; for there was no express covenant that the plaintiff should enjoy the water-course; besides the defendant in the action might have alleged this matter in arrest of judgment, and so he shall not be helped by an attaint, neither does it appear that the execution was taken out, and this attaint being brought upon the statute 23 H. 8. cap. 3. which gives this remedy to the party grieved, and because before execution the defendant is not a party grieved, it doth

doth not lie. But as to these objections the Court said nothing ; but the reporter adds a quære if the plaintiff be not *pars gravata*, because he is subject to the judgment, and so liable to the execution. *Le. 278. pl. 377. Hill. 28 Eliz. B. R. Huddy v. Fisher.*

12. Where the evidence given to the jury is *false in part*, though it be *in a point not material*, yet this is sufficient excuse for their not giving him credit in any other part of his evidence, and so had no cause to find their verdict upon this oath against the party against whom it was given. *Cro. E. 309. 310. pl. 18. Mich. 35 & 36 Eliz. B. R. The Queen v. Ingershall.*

13. It lies against jury, for *finding the bond of Edward* the bond of Edmond. *Palmer. 286. Maley v. Shepley.*

14. The jury may be attainted 2 ways ; 1st, where they find *contrary to evidence* ; 2dly, where they find *out of the compass of the allegata*. But to attain them for finding contrary to evidence is not easy, because they may have evidence of their own conscience of the matter by them, or they may find upon distrust of the witnesses, or their own proper knowledge ; but if they find upon evidence that does not prove the *allegata*, there it is easy to subject them to an attaint, because it is manifest that what is so found is an evidence not corresponding to their issue ; and this was the only curb they had over the jurors ; for the judge being best master of the *allegata*, if they did not follow his direction touching the proof, they were then liable to danger of an attaint ; and therefore *since the judges*, from the difficulty of attainting the jury, *have granted new trials*, whereby jurors have been freed from the fear of attaint, they *have taken greater liberty in giving verdicts* ; but since *the attaint is only refused, and not taken away*, it is necessary that a certain matter should be brought before them ; and therefore *in trespasss*, the quantity and value of the thing demanded must be so conveniently described, that if the jury find *damages* beyond such quantities and value, it may be *apparently excessive*, and they subject to the attaint ; and so *on special contracts*, they must be set forth so precisely, that *if evidence be given of another contract*, and not in the allegations, *and yet the jury find for the plaintiff, they may be subject to an attaint* ; and were it otherwise, if the plaintiff had a jury to his turn, and the judge should direct that the plaintiff be nonsuit, yet if the plaintiff would stand the trial, the judge must give positive directions to find for the defendant, there would be no means of compelling the jury to find according to the direction of the judge, if they were not under the terror of an attaint, if they did otherwise ; so this is the only curb that the law has put in the hands of the judges to restrain jurors from giving corrupt verdicts. *G. Hist. of C. B. 102, 103, 104.*

(E) The Default of the Court.

[1. **I**N an assise, if the jury find a special verdict, and refer it to the Court, whether upon the matter the tenant be a disseisor; and upon the matter the Court adjudge him to be a disseisor, though in law he be no disseisor, yet no attaint lies against the jury, because it is not their fault, but the fault of the Court. 43 Aff. 41.]

S. P. and the judgment of the disseisin is the act of the Court, and not the verdict of the jury,

quod nota. Br. Verdict, pl. 51. cites S. C. — Br. Attaint, pl. 82. cites S. C. and S. P. accordingly. — S. C. cited by Holt Ch. J. Ld. Raym. Rep. 470. Pasch. 11 W. 3. — S. P. per Cur. Cro. E. 309. pl. 18. Mich. 35 & 36 Eliz. B. R. — But following the direction of the Court barely, will not bar an attaint; but in some case the judge being demanded, and declaring to the jury what the law is, though he declares it erroneously, and they find accordingly, this may excuse the jury from the forfeitures; for though their verdict be false, yet it is not corrupt, but the judgment is to be reversed however upon the attaint, for a man loses not his right by the judges mistake of the law; per Vaughan Ch. J. Vaugh. 145. in delivering the opinion of the Court in Bushel's Case.

[But I do not remember to have found it any where suggested, that any thing ever so positively laid down for law, or ever so artfully &c. insinuated by gentlemen at the bar, can excuse the jury from being subject to an attaint; and therefore those gentlemen would do well to consider what apology they can make, should they by such means mislead an ignorant jury, and thereby occasion the ruin of them and their families. In such case, those gentlemen, whether considered as christians, or as honest men, ought to make the sufferers equivalent amends, and at the same time to restore to the adverse party whatever he has lost by such irregular proceedings. The liberty of the bar, when abused, is forfeited; and, like the cities of refuge, was never intended to be a protection to malicious offenders. If an attorney be directed by his client to plead what is false, he may plead that, non veraciter sum informatus; and Judge Jenkins says, that it is an honest plea: and I cannot see why others of a superior rank should not follow so good an example.]

[2. *But if the material matter which they found, upon which they referred the matter of law to the Court, be false, an attaint lies thereupon.* 43 Aff. 41.]

Br. Verdict, pl. 51. cites S. C. but not directly S. P. but

that if the circumstance of the verdict be true, attaint lies not of it. — Br. Attaint, pl. 82. cites S. C. and S. P. seems to be admitted.

(F) At what Time it lies.

[1. **A**N attaint lies before execution sued, for the danger of the death of the petit jury in the mesne time. Contra, 12 H. 6. 6. admitted by issue.]

Br. Attaint, pl. 1. contra, that it does not lie before he, who recovered, takes execution; for before

[2. *As if a man recovers land against another, he shall have an attaint before execution sued, for the danger of the death of the petit jury.* 41 Aff. Attaint, 27. per Mich.]

this the party is not grieved, cites 35 H. 6. 39. 26 H. 8. 2. per Wangford. — S. P. by Prifot. Br. Nontenure, pl. 6. cites 35 H. 6. 44.

Attaint by him who lost in assise, against the plaintiff in the assise, and the petit jury, upon false verdict in the assise; the tenant appeared and six of the petit jury, and the others made default, and against them the inquest was awarded by default; and per Falton Just. the attaint does not lie in this case before execution taken; for three things entitle him to the attaint, [252] scilicet, false oath, judgment, and execution; for he who loses by judgment shall not have attaint during his own possession, unless where the plaintiff or demandant sues execution of damages recovered by false oath, and of this he may have attaint, he himself being in possession of the land. Br. Attaint, pl. 38. cites 21 H. 6. 55. — S. C. cited Le. 279. pl. 337. Arg.

[3. The *vouches* shall have an attaint *before execution in value sued against him*, for the cause aforesaid. 41 Aff. Attaint 27.]

[4. So if in a *præcipe* against a *lessee*, the *lessee vouches B. in the reversion, who enters, and vouches C.* and the *demandant counterpleads that C. nor any of his ancestors &c.* and this is *found for the demandant*; B. shall have an attaint before execution in value sued against him. 41 Aff. Attaint 27.]

Br. Attaint,  
pl. 23. cites  
S. C. that  
attaint was

maintained in B. R. though many of the petit jury were dead; quod nota, though the contrary was held 6 R. 2. per Belknap.——It lies as long as any of the petit jurors are living. Br. Attaint, pl. 30. cites 12 H. 4. 10.——And, pl. 109. cites S. C. per Skrene, that it lies as long as 2 of them are living, for they are jurors pluraliter, pl. 76. cites 34 Aff. 6.——S. P. Ibid. pl. 68. cites 20 Aff. 12. for they are not named in the writ, which is quod diligenter inquiras qui fuerunt jurat, primæ inquisitionis; quod nota. Brooke says, that it seems to be law.

It was agreed that upon adjudgment in a personal

action attaint lies before execution, but contra in action real; for it shall be against the tenant. Br. Attaint, in pl. 9. cites 35 H. 6.

[6. If one man *recovers* against another in *trespass*, the defendant shall have an attaint before execution sued. 41 Attaint 27. Tempore E. 1. Attaint 70. adjudged.]

[7. If a *deed* be pleaded in bar, in which there are witnesses, and this is tried to be his deed, and after the *witnesses die who were joined to the inquest*, the party shall not have an attaint after. 26 H. 6. Attaint 3. per Curiam.]

8. *Audita Querela* passed for the plaintiff, and therefore the defendant who was *conveyee in the statute merchant brought attaint*; Thorp answered, that it *did not appear* that the plaintiff in the attaint *ever had execution* of any land delivered to him, and so cannot have attaint; but the Court was against him, and that he shall have attaint as well as if he had execution in fact. Br. Attaint, pl. 64. cites 21 Aff. 16.

It lies not after death of defendant against whom it should be brought.

D. 5. pl. 1. Mich. 25 H. 8. Anon.

9. The death of none of the defendants in the attaint shall abate the writ, but the death of the tenant; per French, quod non negatur. Br. Attaint, pl. 68. cites 26 Aff. 12.

### (G) Who shall have it, and who not.

Br. Attaint,  
pl. 15. cites  
S. C.——

Fitzh. At-

taint, pl. 18. cites S. C. & S. P. accordingly, though it was objected that such attaint had never been known to be for the King before.——F. N. B. 107. (D) S. P. accordingly.

[1. THE King shall have an attaint upon a false verdict in a *quare impedit*. 42 E. 3. 26. b.]

Br. Attaint,  
pl. 25. cites  
S. C.——

F. N. B. 106. (E) S. P. and the writ shall make mention of the voucher; and in the new notes there (c) cites 9 H. 6. 38. 21 H. 4. 5. 4 Aff. 71. and 4 E. 3.

[2. The *vouches* may have an attaint. 8 H. 4. 4. b.]

[3. The

[3. The vouchee shall have an attaint upon a false verdict given between him and the tenant upon the deed of lien denied. 22 E. 3. 4. b.] Fish. Brief, pl. 380. cites S. C.

4. In assise the tenant pleaded jointenancy with his feme and son, who came and maintained the exception, and the tenant was found sole tenant, and he awarded to prison; and per Thorp Ch. J. if the other be tenant and be ousted, he shall have assise, and not attaint, because he is not party to the original. Br. Assise, pl. 321. cites 31 Ass. 11. It was said for law, that where the tenant pleads jointenancy with J. F. who comes and main-

tains the jointenancy which passes against them, and the demandant enters, he in whom the jointenancy is pleaded shall have assise, and not attaint; for he was not party to the original. Note the difference. And to see that party to the issue shall have assise. Br. Assise, pl. 36. cites 48 E. 3. 16, at the end.

5. If assise is brought against tenant by statute merchant, termor, or the like, and him in reversion, who is tenant of the franktenement, and the assise acquits the tenant by statute merchant, and attaints the other of disseisin, and they two join in attaint, quære whether he who is acquitted shall have attaint, by reason that he is acquitted, and yet by the assise and verdict he loses his interest? Per Tank clearly, the tenant by statute merchant shall not have attaint, nor the lord where the land is recovered against him and the heir, where he has the heir in ward, nor the termor where land is recovered against him and his lessor, because he did not lose any franktenement; but the best opinion here was, that such persons shall have attaint, for they cannot have assise nor quare ejecit infra terminum, nor other remedy. But per Whorwood (the King's Attorney in the time of H. 8.) they shall not have attaint. But Brooke says, this is not reasonable where they are named and lose their interest; but he says, it seems that he who is acquitted shall not have attaint, but if they are found disseisors, it seems to him that they shall have attaint; quære, for it was adjourned. Br. Attaint, pl. 82 cites 43 Ass. 41.

6. Where trespass is brought against baron and feme, and the plaintiff recovers, the baron alone shall not have attaint, for it shall be brought according to the record. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9. per Tank and Finch.

7. Successor of a parson shall have error or attaint of judgment against his predecessor. Br. Attaint, pl. 110. cites 8 H. 6. 25. and 19 H. 6. 39. accordingly; quod nota bene.

8. If a man has issue a son by one venter, and a daughter by another, and entails the land to him and his second feme, and the heirs of their two bodies, and recovery is had against them by false oath, the attaint is given to the son and not to the daughter, per Fortescue. Br. Attaint, pl. 40. cites 22 H. 6. 28.

9. So, per Fortescue, where a man has two sons in burgh English, and loses by false verdict and dies, the attaint is given to the eldest son, and so the daughter and the youngest son shall falsify the recovery by him, which Yelverton utterly denied. Ibid.

10. If

10. If a man brings bill *quod reddat* T. 40l. *quas domino regi & prædicto T. debet* upon the statute 23 H. 6. cap. 10. and the jury pass against the defendant falsely, attaint lies for the defendant; for the King is not merely party; for the party may discontinue or release without the King, notwithstanding that the King shall recover the moiety, and therefore the attaint was demanded; quod nota; and so it is admitted, that if the King was merely party attaint does not lie. Br. Attaint, pl. 130. cites 20 H. 7. 5.

11. Attaint goes with the land as writ of error shall do. Br. Faux de Recovery, pl. 50. cites Tempore H. 8.

[ 254 ]

The King may have attaint upon a false verdict given against him in an information.

Cro. E.

309. pl. 18.

Mich. 35

& 36 Eliz. B. R. in the Case of the Queen v. Ingerfall. — But though the information was for the Queen and the party himself, yet she cannot join with him in bringing the attaint; said as admitted. Ibid. — S. P. & S. C. cited by Serjeant Maynard accordingly. 2 Jo. 14. Arg. — In action on a penal statute brought for the King the Attorney General alone replies and joins the issue, and therefore some think that an attaint lies not on such an information when a false verdict is found for the defendant; for the informer did not join issue; but Jenkins says the law seems to be otherwise; for an attaint lies against the informer if the verdict passes for him; and by the like reason, if a verdict passes against him, an attaint lies for the King against the jury which passed against the King; where a false verdict passes for the King, upon a petition made to the King, an attaint may be brought, which is only against the jury that gave the false verdict. Jenk. 228. pl. 94. — It was held by all the barons, that where the Queen is sole party against the subject, and the jury find for the Queen, no attaint lies; contrary where the suit is tam pro domina regina quam pro seipso. 3 Le. 46. pl. 121. Trin. 32 Eliz. in the Exchequer. Anon.

13. None shall have attaint but he that may be restored to the thing lost by the judgment; per Bramstone Ch. J. Mar. 210. Pasch. 18 Car. cites 2 R. 3. 21. D. 89. and 9 Rep. Ld. Sanchar's Case.

(G. 2) Who shall have Attaint jointly or severally.

1. **I**N præcipe quod reddat, if the tenant pleads jointenancy with a stranger not named, and issue is thereupon joined, and it be found against the tenant by verdict, it was held that the tenant alone, without the stranger, shall have attaint. Thel. Dig. 32. lib. 2. cap. 14. f. 1. cites Trin. 3 E. 3. 89.

2. It was objected that another disseisor was found by the assise who did not join in the attaint; but it was said, that it may be that this plaintiff paid all the damages, and so shall have the attaint alone; and that in assise brought against several other tenants who lose, they all may have one suit to reverse this judgment, and if it be reversed, every one shall re-have according to that which he lost; quod nota. Br. Attaint, pl. 53. cites 8 Ass. 30. and 8 E. 3. 71.

3. Where

3. Where assise passed against several, one of the disseisors was received to maintain attaint alone; and to assign the false oath in the principal, and in right of damages entirely without the others. Thel. Dig. 33. lib. 2. cap. 14. f. 3. cites Mich. 8 E. 3. 439.

4. In one writ, if there are 20 præcipes, yet it is but one jur. as to the demandant, and the Roll makes mention but of jurat. and the demandant shall have but one attaint, but the tenants shall have several attaints. Br. Attaints, pl. 59. cites 14 Aff. 2. Writ against three by several præcipes, and they are at several issues, and it passes against the demandant, he may have one and the same writ of attaint; for it is one and the same jury as to him. Br. Several Præcipe, pl. 12. cites 14 Aff. 2. But if they had passed for him, the three tenants should have had several attaints; for it was several juries as to them. Ibid.

5. In a writ of formedon by one præcipe against a baron and his feme of 2 parts of a manor, and by another præcipe against another stranger for the 3d part, which stranger vouched to warranty the baron who traversed the gift in both the præcipes, and found against the demandant; upon which he was received to maintain one writ of attaint upon the verdict in both the præcipes; but if the tenants were to bring writ of attaint, they ought &c. Thel. Dig. 32. lib. 2. cap. 14. f. 2. cites Hill. 14 E. 3. Attaint 41.

6. In præcipe quod reddat against baron and feme, he made default, and [the feme] was received, and pleaded to the issue and lost, and the baron and feme brought attaint, and well, tho' he was not party to the issue. Quod nota. Br. Attaint, pl. 61. cites 16 Aff. 5.

So in assise, Br. Attaint, pl. 107. cites 11 H. 4. 50. Thel. Dig. 33. lib. 2. cap. 14. Attaint 24.

f. 16. cites Pasch. 16 E. 3.

7. But it was adjudged that one plaintiff shall not have one writ of attaint against 2 several inquests, who passed against him in 2 several writs or bills. Thel. Dig. 33. lib. 2. cap. 14. f. 3. cites Pasch. 25 E. 3. 42.

8. It was adjudged that where in assise one who has taken the entire sole tenancy loses by false verdict, though he alone shall have a writ of attaint without the others named in the assise notwithstanding that the defendant in the attaint said, that he had nothing in the franktenement, but only in common with others named in the assise, and now not named &c. Thel. Dig. 33. lib. 2. cap. 14. f. 10. cites 27 Aff. 61.

9. But in assise of mortdancestor brought against several, some of them pleaded several tenancy, others disclaimed, and others said nothing, and it was found the tenancy in common as was supposed by the writ, and further the points of the writ were found &c. upon which all named in the writ brought one writ of attaint in common, where the several tenants assign the false oath severally as to the tenancy in common found &c. and as to the points of the writ and damages, they all assigned the false oath in common. Thel. Dig. 33. lib. 2. cap. 14. f. 7. cites 29 Aff. 9. but adds, quære legem.

In assise against 3 sisters, it was found that 2 disseised the plaintiff, and that the 3d did nothing, and all 3 brought attaints, and the 3d who

did nothing made default, and was severed, and the defendant pleaded to the writ, because she who was acquitted had joined with the other 2, and therefore the writ was abated. Quod nota. Br.

Attaint, p. 71. cites 29 Aff. 14.—Br. Attaint, pl. 10. cites 5 C. For the 3d was not granted, and therefore the 4th was not granted.—Thel. Dig. 33. lib. 2. cap. 14. f. 5. cites 5 C.—5 C. cases orig. Le. 317. at pl. 445.

10. It was held where the *tenant of the franktenement* and the *tenant by statute merchant* loses by false verdict in assise, that they may join in writ of attaint, notwithstanding that the *tenant by statute merchant* was acquitted of the disclaim. Thel. Dig. 33. lib. 2. cap. 14. f. 9. cites 43 Aff. 41.

11. *Baron and some* attainted by false verdict in trespass, may join in attaint. Thel. Dig. 33. lib. 2. cap. 14. f. 11. cites Mich. 47 E. 3. 10.

12. In assise against 2, who take severally the entire tenancy, if it be found by verdict against them, yet they may join in attaint. Thel. Dig. 33. lib. 2. cap. 14. f. 15. cites Hül. 3 H. 4. 50.

Br. Abridg.  
new, pl. 4.  
cites 5 C.

—Br. Joinder  
in action, pl. 4.  
cites 5 C.  
but of the  
damages  
they shall

13. *Trespass* against two who pleaded not guilty, and were found guilty to the damage of 10l. and the one alone sued attaint, and assigned the false oath in all which they had said against him, which goes as well to the damages as to the principal, and it was agreed that of the principal he shall have attaint alone, because their plea is several in law, but not of the damages; for they are entire. Br. Attaint, pl. 9. cites 34 H. 6. 12.

join in attaint, or he shall abridge his demand of the damages.—Thel. Dig. 33. lib. 2. cap. 14. f. 12. cites 5 C.

[ 256 ] Where several were found guilty by verdict in trespass, one writ of attaint brought by them in common was adjudged good. Thel. Dig. 33. lib. 2. cap. 14. f. 4. cites Trin. 18 E. 3. 25. and 17 Aff. 22. and that so agrees Trin. 30 E. 3. 2. and 30 Aff. 49. and that it was said there for law, that they may have several writs of attaint, and says, see 46 E. 3. 21. 47 E. 3. 10. 48 E. 3. 14. and 34 H. 6. 11. 30.—And so it was held there for law, that if in assise or trespass some are found several disseisors or trespassors, the damages shall be severally assised, and then they shall sever in writs of attaint. Thel. Dig. 33. lib. 2. cap. 14. f. 5.—And it was said that if several tenants lose in assise, they ought to have several attainments; but if the damages are entirely taxed too high, they may join in attaint in right of damages. Thel. Dig. 33. lib. 2. cap. 14. f. 6. cites Trin. 30 E. 3. 2.

Where the plaintiff in the first action brought conspiracy against 2, and the one pleaded not guilty, and the other pleaded justification, absque hoc that he was guilty after such a day, and so to issue, and all found for the plaintiff, and one of the defendants brought attaint alone. Upon long argument it was awarded that attaint lies of the principal, and the plaintiff was compelled to abridge his demand of the damages; quod nota. Br. Attaint, pl. 9. cites 35 H. 6. 19.

Br. Joinder  
in Action,  
pl. 4. cites  
5 C.

14. But where they plead release, or such like joint plea, there they cannot sever in attaint. Br. Attaint, pl. 9. cites 34 H. 6. 12.

But if the issue be found against them by false verdict upon acquittance or abatement, or other matter jointly pleaded by them in bar, they ought to join in attaint. Thel. Dig. 33. lib. 2. cap. 14. f. 12. cites 5 C.

15. Where conspiracy was brought against 2, and the one pleaded not guilty, and the other pleaded a bar &c. and both the issues found by verdict against the defendants, the one of them alone was received to maintain writ of attaint for the false oath in the principal, but not in right of damages; per judicium. Thel. Dig. 33. lib. 2. cap. 14. f. 13. cites 34 H. 6. 30. and Mich. 35 H. 6. 19.

And quere  
where this

16. If a man vouches 2, and recovers in value, and has execution



*tion against the one alone, yet both shall join in attaint.* Br. Attaint, pl. 9. cites 35 H. 6. 19. per Fortescue.

one of the defendants has attaint of the prin-

vipal as above, and attaints the petit jury, if the other may have attaint also, and again. It seems that he may; for the one is a stranger to the other issue upon several plea, though it be pleaded jointly and at one and the same time. Ibid.

attaint them

17. It seems that in action real or personal ex parte petentis, all ought to join in attaint. Br. Attaint, pl. 9. cites 35 H. 6. 19.

And if the one be nonsuited, severance lies

where it is brought upon real action; contra where it is brought upon personal action. Ibid.

18. And ex parte defendantis, or tenentis, they may sever in attaint upon plea several in action real or personal. Br. Attaint, pl. 9. cites 35 H. 6. 19.

And upon joint plea they ought to join, if it be brought

upon action real or personal. Ibid.

19. It was held that where 2 bring formedon against other 2, and one of the tenants pleads the release of one of the demandants, and the other tenant the release of the other demandant, and both the releases are found against the demandants, yet the demandants shall join in writ of attaint, notwithstanding that each be a stranger to the others issue. Thel. Dig. 33. lib. 2. cap. 14. f. 14. cites 35 H. 6. 22.

## (H) In respect of the Estate. [Not Party to the Writ or Issue.] 257

[1. In a quare impedit against 2, they make several titles, and it is found for one defendant, and the other disturbs him, the other may have an attaint upon this; for by this he loses the presentation. 45 E. 3. 14.]

Br. Quare Impedit, pl. 35. cites S. C. & S. P. by Finch.

[2. He who is party to the recovery shall have an attaint, although he was † not \* tenant at the time of the first writ brought, nor when the judgment was given. 41 E. 3. 19.]

\* Fol. 283.

† See Br. Attaint, pl.

69. cites 27 Aff. 61.

[3. In an action, if jointenancy be pleaded with a stranger, and the stranger joins with the tenant in the maintenance thereof, and this is found against them, yet the stranger shall not have any attaint, because he is not party to the writ. 48 E. 3. 17. b.]

Br. Attaint, pl. 20. cites S. C. accordingly. — Godb. 378. Arg.

cites S. C. that if the party to the writ pleads jointenancy with a stranger, and the verdict passes against him, he shall not have attaint; but Jones J. said, that he might have attaint. — Roll Rep. 243. Arg. cites 31 Aff. 11. 31 E. 3. Attaint 35. S. P. exactly, and seems admitted by Coke Ch. J. who said, that so it is of prayee in aid.

[4. In an action against A. and B. it is found against them upon several issues, A. shall not have an attaint upon a false verdict against B. because he was not party to this issue. 11 H. 4. 27.]

Br. Attaint, pl. 27. cites 11 H. 4. 26. S. P. — Fitzh. Attaint, pl. 15. cites S. C.

Fitzh. Trial,  
pl. 37. cites  
S. C. & S. P.  
by Hull.

[5. In *trespass* against 2, if one pleads a release, upon which they are at issue, and the other pleads the same plea as servant to him, if it be found against the master, the servant shall not have an attaint thereupon; for he is not party to his issue. 11 H. 4. 30. b.]

Br. Attaint,  
pl. 29. cites  
S. C.

[6. In *waste* against 2, if one makes default, and the other pleads, and it is found against him, the other, who made default, shall not have an attaint thereupon, because he is not party to the issue. 12 H. 4. 5. b.]

Fitzh. Trial,  
pl. 6. cites  
19 H. 6. 17.  
S. C. &  
S. P.

[7. If the *villein* be found free in *homine replegiando* against the lord, and after the lord dies, the heir shall have an attaint. 19 H. 6. 18. b.]

Fitzh. Trial,  
pl. 6. cites  
19 H. 6. 17.  
S. C.

[8. If the *villein* be found free by a false verdict in an action of *trespass* brought by him against the lord, and after the lord dies, his heir shall have an attaint, though the verdict was in a personal action, and for damages only, because this takes away his inheritance in the *villein*. Contra 19 H. 6. 18. b.]

[9. But he shall not have an attaint for the damages.]

Fitzh. Trial,  
pl. 6. cites  
19 H. 6. 17.  
S. C.

[10. But in this case the executors of the lord shall have an attaint for the damages, because they belong to them. Contra 19 H. 6. 18. b. because they lose no damages.]

11. The issue in tail shall not be barred by release of his father of all actions, or of all the right found against his father by verdict, but the issue may have attaint. Br. Tail & Dones &c. pl. 42. cites F. N. B. 108.

12. Attaint by J. against E. who said that he himself leased to the plaintiff for years, so that he lost nothing but a term by the first verdict, and demanded judgment of the writ, and non allocatur; and so see that termor shall have attaint of his term. Br.

[ 258 ] Attaint, pl. 35. cites 21 E. 3. 47.

Br. Damages,  
pl. 29. cites  
S. C.

—S. C. cited 11 Rep. 6. a. per Cur.—If *trespass* be brought against 2, who plead to issue severally, and several *venire facias* be awarded,

13. False imprisonment against 2, the one came and pleaded, and the issue is found against him to the damage &c. and after the other came and pleaded *villeinage* in the plaintiff, which is found against him at the same time, in another action between them, and therefore he was stopped to plead it, by which judgment was against both of the damages where the second was not party to the issue which found the damages, and yet well, for he was party to the original, and therefore shall have attaint, though he was not party to the issue; quod nota, per Thorp clearly, & nullus dedixit, and upon this reason judgment was given immediately; quære. Br. Attaint, pl. 17. cites 44 E. 3. 6.

this jury, which first passes, shall assess the damages against both, and he who is party to the original, and a stranger to the issue, if he be grieved for the damages he shall have attaint, and yet he is a stranger to the issue, but he is party to the original, per Moyle j. Quod nota for law; for nullus negavit; and in this case the second inquest shall not assess the damages. Br. Attaint, pl. 44. cites 39 H. 6. 1. —F. N. B. 107. (E) S. P. and in the new notes there (e) says, it seems that in this case as to the damages they shall join in an attaint, and cites it adjudged 25 H. 6. 23. but as touching parcel, if they are found by one verdict guilty, they may join, and cites 18 E. 3. 1. 30 E. 3. 1. or they may sever, cites 35 H. 6. 21. per Ashton. 46 E. 3. 81 per Finchden, and says, see 1 H. 5. 13.

\* 44 E. 3. 7. 44 H. 6. 32.

\* S. C. cited, and S. P. resolved 11 Rep. 5. b. 6. a. Trin. 10 Jac. in Sir John Heydon's Case. —S. C.

—S. C. cited by Coke Ch. J. accordingly, in delivering the judgment of the Court, in the Case of Cobb v. Heydon. Cro. J. 349. pl. 2. —Hob. 66. pl. 69. S. P. resolved in the Case of Cocke v. Jennor. —S. P. resolved accordingly, 10 Rep. 119. a. Mich. 10 Jac. in Cheyney's Case.

A joint trespassor, though a stranger to the issue, yet being privy in charge, shall have attaint for excessive damages given by the jury against his joint-trespassor. Resolved 11 Rep. 5. b. Trin. 10 Jac. Heydon's Case, and says, that with this accords 44 E. 3. 7. b. adjudged in point, and F. N. B. 107. (E). —10 Rep. 119. a. S. P. per Cur. and cites the same Cases.

14. *Baron and feme lost by false oath in quare impedit brought by them, and the damages were levied upon the baron, and he died, and the feme took another baron who brought attaint, and recovered, and were restored to the damages lost by the first baron, and recovered the advowson in jure uxoris, and 100l. in damages by the attaint, and it was brought by him who first recovered, and another who was not named in the first record, and so they recovered the first damages lost by the first action, against him who first recovered only, and the damages given in the attaint against both, and the feme was restored to the first damages because she was party to the first judgment, and if they had not been levied upon the baron in his life they would have been recovered against the feme.* Br. Attaint, pl. 114. cites 46 Aff. 8.

15. *Attaint was brought by baron and feme of false oath given against the feme and her first baron in quare impedit, and awarded good.* Br. Attaint, pl. 18. cites 46 E. 3. 23.

16. *And so the feme had the attaint, and not the executors of the baron who lost.* Ibid.

17. 9 R. 2. cap. 3. Enacts, that *he in reversion shall have attaint upon a false verdict found against the particular tenant.*

At common law the reversioner might have

had attaint of a false verdict against tenant for life after the death of the tenant for life; but now by this statute he may have it in the tenant's life-time. D. 1. a. b. pl. 5.

Though this statute speaks only of reversions, yet it was resolved that remainders are also within the purview thereof; but that reversion or remainder expectant on estate tail is neither within the words or intention of this act; for since the makers of the act have by special words provided remedy for those in reversion expectant on estate for life, in dower, by the curtesy, or in tail after possibility of issue extinct, by this precise enumeration their intent appears to exclude reversions and remainders expectant on estates tail. 3 Rep. 4. a. b. Trin. 5 Eliz. in the Marquis of Winchester's Case.

18. *In assise against disseisor and tenant, if the tenant is acquitted of the disseisin, and the disseisor thereof attainted, the tenant shall have attaint of the oath against the other, because his title is lost by this cause.* Br. Attaint, pl. 28. cites 11 H. 4. 50.

19. *In scire facias upon an annuity the parson prayed aid of the patron and ordinary, and they join, and the issue passes against them, yet the patron and ordinary shall not have attaint.* Per Newton Ch. J. and so it seems that none shall have attaint but he who is party to the original, and not he who comes in a latere. Br. Attaint, pl. 36. cites 19 H. 6. 75.

[ 259 ]  
F. N. B.  
106. (F)  
in the new  
notes there  
(d) cites  
S. C. and  
22 H. 5. 28.

20. *If a man has issue a son, and takes a second feme, and land is given to him and his second feme in tail, and after they lose by false verdict, and die, leaving issue another son by the second feme, the issue*

in tail shall falsify; for he cannot have attaint, because it is only for the heir, who is the *eldest son*, and he cannot have it as here; for he is not heir to the land entailed. Br. Attaint, pl. 124. cites 22 H. 6. 28. per Fortescue.

21. *So in Burgh-Engliff*, where a man has issue two sons, and loses by false oath, and dies. Ibid.

22. *The testator entered into religion, and was deraigned. Quære* if attaint lies against the heir or executor; or if the executor brings attaint, if the testator shall be restored; as if the *son is barred in a mortdancefloor*, the daughter shall have an attaint, and there the judgment was against her brother of the half blood only, F. N. B. 105. (O) 106. in the new notes there (a) cites Kelw, 199. So a *special heir* shall have attaint. 22 H. 6. 28,

## (H. 2) Against whom.

1. **ATTAIN**T against him who recovered and 2 others *qui terram illam tenent*, and for the 2 it was pleaded that the one had nothing, judgment of the writ, and non allocatur, and the other took the tenancy upon him and vouched, and was ousted of the voucher, because this suit is to restore the plaintiff to his first possession, of which no mesne time is adjudged in the law; quod nota; and there it was said that this reason may be made in quod ei deorceat, and yet a man shall vouch there; but there he shall vouch by the statute of Westm. 2. cap. 4. Br. Attaint, pl. 55. cites 10 Aff. 8. 10 E. 3. 21.

Br. Non-  
tenure, pl.  
24. cites  
S. C.

2. Attaint was brought against another who did not recover, nor his heir, and awarded good; for it is a summons, and shall abate by nontenure. Br. Attaint, pl. 59. cites 14 Aff. 2.

3. Attaint lies for the tenant against the voucher. F. N. B. 106. (D) in the new notes there (b) cites 22 E. 3. 11.

If a man re-  
covers land,  
and aliens,  
and he who

4. The attaint shall be against the *tertenant*. Br. Attaint, pl. 26. cites 8 H. 4. 23.

loses brings attaint, it shall be brought against the *tertenant*, and not against him who recovered who is not *tertenant*. Br. Attaint, pl. 19. cites Old Nat. Erev. tit. Attaint, 68.

Attaint shall be against tenant of the *franktenement* &c. Br. Error, pl. 109. cites 6 Aff. 6.

2 Sid. 97.  
Trin. 16; 8.  
Newdigate  
J. cites S.  
C. as that  
A. B. and  
C. were tenants for life, with remainder to A. in tail; and the quære is, if after the death of A. his issue may have attaint, and he holds that he may, notwithstanding it is there doubted; for he cites it as agreed D. 201. pl. 65. that the action of attaint arises for the thing which was lost against him who has it, into whole hands soever it shall come.

5. If action of *trespass* is brought against the ancestor in tail and B. and C. and passes against them, and the ancestor dies, the attaint is given to the *survivor*. Br. Estoppel, pl. 168. cites 13 E. 4. 2 & 3. by Catesby. Quære.

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An attaint  
was brought  
upon this  
statute

6. 23 H. 8. cap. 3. f. 2. Enacts, that upon every untrue verdict before judges of record (except where the thing in demand extends not to the value of 40l. or concerns life) the party grieved shall have an attaint.

*attaint against the petty jury, and also against the party that bath the judgment thereupon.* *against the executors of J. B. and the tert-*

ments, and held well brought by the equity of this statute, though the words of the statute are, that the attaint shall be between the parties; and says that so it may be against the heir; as it is there held. Mo. 17. pl. 60. Pasch. 3 Eliz. Austin v. Baker. — Bendl. 87. pl. 122. S. C. accordingly. — And. 24. pl. 53. S. C. accordingly, and says it was done in one Cage's Case, 6 July, 6 E. 6. — D. 201. pl. 65. a. b. S. C. held accordingly; for this statute was made in favorem subditorum to qualify the rigour of the common law, and the words (against the party that hath judgment to recover) are superfluous, and not words of substance, inasmuch as the action of the attaint is for the thing lost, against him who has it, be he who he will.

The plaintiff in attaint assigned the false oath in omnibus que dixerunt, but did not shew the value of the thing rendered by the verdict; but it was held that the assignment was good, because the certainty of the value appears in the first records, so that the justices may well enough know what it is. Besides, though the words are, viz. "Where the thing in demand, and verdict thereon given, extends to 40l. yet in the principal Case, which was an avowry for a grant out of the manor of S. whereof the place where is parcel, and issue was that it was not parcel, and found for the plaintiff, and damage to 10l. in which case the verdict was given upon a collateral matter, and not upon the thing demanded, the attaint shall be maintained by the statute, and the value shall not be accounted of the collateral thing whereof the issue was taken and the verdict given, but of the damages which were demanded. Dal. 32. pl. 16. 3 Eliz. Anon. — Kelw. 205. b. pl. 4. S. C. in totidem verbis.

7. 23 H. 8. cap. 3. Enacts, that if the petty jury are found to have given an untrue verdict, they shall each of them forfeit 26l. to be divided between the King and the plaintiff, and incur severally fines at the discretion of the justices, and be for ever after disabled to give testimony in any Court.

## (I) In what Things it [the False Oath] may be assigned.

[1. A MAN can not assign such thing for a false oath which was admitted true by him in the first action. 11 H. 4. 27.] Br. Attaint, pl. 27. cites S. C. — Fitzh. Attaint, pl. 15. cites S. C.

[2. [As] In an assise against 2, if one pleads the release of the plaintiff in bar, by which he admits the plaintiff to be well named, if the other pleads a misnomer of the plaintiff, and all is found for the plaintiff, if he who pleaded the release brings an attaint on'y, he cannot assign the false oath in the misnomer: but otherwise if both had assigned it, and brought the action. 11 H. 4. 27.] Br. Attaint, pl. 27. cites S. C. — Fitzh. Attaint, pl. 15. cites S. C.

[3. So it shall be, if one defendant had said that the plaintiff was feme covert, and the other as above. 11 H. 4. 27.]

[4. So if one pleads a release, and accepts the tenancy of the whole, and the other says that his ancestor died seised, and they in sans tort; in an attaint by him who pleaded the release, he cannot assign that the ancestor of the other died seised, and [that] he [viz. the other] is tenant against his own acceptance. 11 H. 4. 27.] Fitzh. Attaint, pl. 19. cites S. C.

[5. In trespass, if the defendant pleads a misnomer of the will upon which they are at issue, and the jury finds this for the plaintiff, and that the defendant is guilty of the trespass, and assesses damages, the defendant cannot assign the false oath, in that he was

[ 261 ] *not guilty of the trespass, for this was admitted by his plea.* 44 E. 3. Attaint 23. adjudged, and not part of their charge.]

6. *Mordancestor against 3, the one pleaded several tenancy to the writ, which was found, and the points of the writ also, and the other brought attaint, and assigned the false oath, as well in the plea to the writ as in the principal issue of the points, and well per Fish; and adjournatur into Bank.* Br. Attaint, pl. 70. cites 29 Aff. 9.

Br. Attaint,  
pl. 84. cites  
50 Aff. 4.  
S. P. held  
accordingly.

7. In attaint founded upon assise the record was, that the parties in the assise recovered the tenements put in view, and the plaintiff in the attaint assigned the false oath in rent, judgment &c. and non allocatur. Br. Attaint, pl. 72. cites 30 Aff. 24.

Fitzh. At-  
taint, pl. 15.  
cites S. C.

8. When the tenant in assise pleads bar to the issue, which is found against them, and the seisin and disseisin also, by false oath, the party shall have attaint of the seisin and disseisin without assigning the false oath upon the bar, and yet the seisin and disseisin was never in issue; but it ought to be enquired of necessity. Br. Attaint, pl. 27. cites 11 H. 4. 26. per Culpeper.

9. A man shall not assign false oath in attaint in the plea of his companion, who is not party to the attaint, where they severed in pleas in the first action. Br. Attaint, pl. 107. cites 11 H. 4. 50.

10. In ejectment, the plaintiff counted of excessive damages; the jury found the title for the plaintiff, and assessed damages, which the plaintiff had declared in his count, but no evidence was given concerning them, nor did the jury take any regard to them. The defendant brought attaint, and assigned the false oath in omnibus quæ dixerunt; the Court affirmed the verdict as to the title, and as to the damages, would not charge them of any voluntary perjury, for the reason aforesaid. D. 369. b. pl. 55. Pasch. 22 Eliz. Anon.

Fol. 284.

### (K) How the false Oath is to be assigned.

[1.] In an assise, if the verdict passes against the plaintiff he may have an attaint, and assign the false oath, for not finding a release, or other special matter, which proves that he had title to the land, and so the tenant a disseisor, without assigning the false oath in the principal, scilicet, the disseisin; though all the matter amounts but to this, that he was disseised, for he may assign it in the particular causes of the judgment. 26 Aff. 12.]

Br. Attaint,  
pl. 69. cites  
S. C. —  
See (E)  
pl. 1.

[2. In an assise, if the inquest find a special verdict, and refer it to the Court, and upon the matter found, the Court gave judgment against the tenant, and he brings an attaint, he may assign the false oath severally in every or any point of the special verdict, without assigning it in the principal point, scilicet, the disseisin; for by the verdict it is not plainly found that the tenant disseised the plaintiff, but the justices adjudged it a disseisin, so that the disseisin which is adjudged is the act of the judges, and the matter found is the act of the jury, so that it is more natural to assign it in that which was done by the jury than in that which is done by the justices. 27 Aff. 61. per Curiam adjudged.]

3. Where

3. Where *issue* is only upon the *seisin* and *disseisin*, the writ of *attaint* shall be special upon this point; but where *issue* in the *assise* is joined upon another point, and also upon the *seisin* and *disseisin*, there general writ of *attaint* shall serve best. Br. Attaint, pl. 27. cites 11 H. 4. 26. per Hill and Wakefield.

B. S. and J. his feme, brought *attaint* against N. E. of a verdict in *assise* of novel *disseisin*,

and the writ willed *parat. sacramento recognoscere si prædict. B & J. & alii injuste disseisiverunt prædict. N. E. de libero tenemento suo in Salop unde idem B. & J. queruntur, quod jur. inde in assisa falsum fecerunt sacramentum*; and in the *assise*, the baron and feme pleaded record, and failed at the day, and B. made default, and J. his feme was received, and pleaded diverse pleas out of the point of *assise*, and all found for N. E. and the *seisin* and *disseisin*; and now the plaintiffs in the *attaint*, who made default in the *assise*, brought the *attaint*, and assigned the false oath, in all points found by the *assise*; and the defendant took exception to it, because the writ did not make mention but only of the *seisin* and *disseisin*, and therefore shall not assign the false oath in other points. But Gasc. held contra, and that by writ general, the false oath shall be assigned in every point special, and also that the writ of *assise* is quod injuste & sine judicio disseisivit eum de libero tenemento suo &c. and yet the *assise* shall enquire of all other points pleaded out of the point of *assise*, and so here; and Huls to the same purpose, for the writ is true in all points; for the *assise* was summoned, and taken between the baron and feme and the plaintiff; and after Gascoign and Huls held the general writ good, and the plaintiff assigned the false oath in all points, and the points of the false oath were found, and some were assigned in the pleas of others who were not plaintiffs in this writ, and of those the defendant was discharged, and maintained the oath good of the rest, and after the parties agreed. Br. Attaint, pl. 28. cites 11 H. 4. 50.—Thel. Dig. 102. lib. 10. cap. 10. f. 19. cites S. C. and that the word (unde) shall be referred to all the *assise*, and not to the words of the *disseisin* only, and that the plaintiff upon such writ may assign the false oath upon other points besides the *disseisin*.

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## (L) How it [the false Oath] may be. [assigned.]

[1. IF a verdict be found that he *non dedit*, and an *attaint* is brought thereupon, the plaintiff may assign the false oath in omnibus quæ versus ipsum dixerunt, without assigning it in special, as to say in hoc & hoc &c. for the particulars appear by the record. 6 E. 4. 5. b. adjudged, Attaint 7.]

Br. Attaint, pl. 86. cites S. C. & S. P.—Br. Attaint, pl. 9. cites 34 H. 6. 12. S. P. accordingly.

cordingly.—Jenk. 125. pl. 54. S. C. & S. P. for it refers to the issue, which is single.

[2. In an *attaint*, if the plaintiff assigns the false oath in excessive damages, he ought to assign it in this manner, scilicet, that the goods for which the damages were given were but of the value of 40s. and that in the damages given over this sum, they made a false oath. 12 E. 4. 5. b.]

Br. Attaint, pl. 90. cites S. C. accordingly.—Fitzh. Attaint, pl. 11. cites S. C. & S. P.

3. In *assise* the plaintiff recovered upon verdict, and the disseisor brought *attaint*, where there was another disseisor named in the *assise*, and he assigned the false oath in that which was found, that he commanded W. P. to make the rescous where he did not command, and also that they taxed damages to 40 marks, where they were not to 10l. and so false oath, and it was challenged, because by the first point he supposes no damages nor *disseisin*, and by the other he supposes contrary, & non allocatur; for if he was acquitted of the *disseisin*, no more shall be enquired, and if e contra, the damages shall be enquired. Br. Attaint, pl. 53. cites 8 Aff. 30. and 8 E. 3. 71.

4. In general writ of attaint the plaintiff has liberty to assign the false oath in any point, viz. where the writ is *quod falsum fecerunt sacramentum in omnibus* quæ versus ipsum dixerunt; contrary it is where the writ is *quod falsum fecerunt sacramentum in such a point special*. Br. Attaint, pl. 27. cites 11 H. 4. 26.

It was agreed, that by the death of the defendant after garnishment the writ shall abate, so he remains a party. Ibid.

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5. *Detinue* was brought, and the defendant prayed garnishment, and the garnishee pleaded to issue, and it was found for the garnishee, and the plaintiff brought attaint against the jury, *quod falsum fecerunt sacramentum in loquela* which was between the plaintiff and the garnishee, and the other pleaded to the writ, because he did not make mention of the defendant; for judgment of the writing shall be against the defendant, and of the damages against the garnishee; but per Babb. because the defendant did not make title to the writing he is not to be restored to any; so because attaint is to restore the party he need not make any mention of it, and Strange and Cott. agreed, because all the words of the writ are true; but Paston contra; for this word *loquela* shall be intended writ original, and not the *scire facias*; and Newton, Rolfe, and Paston held clearly that the writ shall abate. Br. Attaint, pl. 4. cites 9 H. 6. 38.

6. It is agreed, that in attaint after voucher or rescipe mention shall be made of the tertenant; for if the first record be reversed he shall be restored. Ibid.

7. So upon aid prayer, there mention shall be made of both in the attaint. Ibid.

### (M) What subsequent Act will take away an Attaint.

Fitz. Judgment, pl. 10. cites S. C. and per Babb. if we abridge the damages, he may have attaint notwithstanding. But per Godred, if the Court increase the damages the plaintiff shall not have attaint for too small damages, because he assents to those damages whereof he has judgment.

[1. IF a jury give excessive damages, and the Court abridges them and makes them reasonable, no attaint lies against the jury, though they have made false oath; for such abridgment is made upon the prayer of the party, ergo, he shall not have an attaint also, and now also he is not at any prejudice thereby. 9 H. 6. 2. b.]

[2. So if the Court increases the damages and makes them reasonable, whereas before they were very small, no attaint lies for the smallness before the increase, for the cause aforesaid. 9 H. 6. 2. b.]

\* Br. Attaint, in pl. 90. cites 35 H. 6. that it was a good bar in attaint that all the damages were released of record. — Fitzh. Attaint, pl. 11. cites S. C.

[3. So if the jury gives excessive damages, and after the plaintiff to whom they are given releases part of the damages, by which the rest of the damages which remain are reasonable enough, no attaint lies; for now the cause of the grief of the defendant is taken away. \* 12 E. 4. 5. † 14 H. 7. 5. per Fin.]

† Br. Attaint, pl. 41. cites S. C. for the attaint is not only to punish the jury, but to answer the party his damages, per Cur. But per Fineux, where the attaint is brought of the principal, release of the damages is no plea, for it may be that the party shall be imprisoned, or shall make fine for the trespass, which is matter beyond the damages; quod nota bene. Ibid.



4. If a manor be given to 2, and to the heirs of the body of the one, to which manor a villein is regardant, and after the villein is found frank against them, the tenant in tail has issue and dies, and after the other dies, the issue in tail shall not have attaint nor falsify, because the attaint was once given to the survivor, and did not descend immediately; *quare*; for the manor descended. Br. Attaint, pl. 117. cites 13 E. 4. 2.

5. In attaint by several plaintiffs against several defendants the jury passed for the plaintiffs, and they prayed the judgment, because if any of the plaintiffs die the action is lost; but Fineux said, that the term continues yet these three weeks, and though one of the plaintiffs should die during the term, you are at no mischief; but the book says he did not shew the reason why &c. Kelw. 61. b. pl. 1. Trin. 20 H. 7. Gainsford v. Gulford.

6. If a man brings attaint upon a verdict in writ of trespass, one of the petit jury may plead release of all actions and demands, and this shall be a bar against all in the attaint. Br. Attaint, pl. 3. cites 6 H. 8. 4.

Contra it  
[ 264 ]  
seems if it  
was founded  
upon a real  
action. Ibid.

## (M. 2) Writ and Abatement.

1. IN writ of entry in *Suffex* foreign plea was pleaded, which was tried in *London*, upon which the attaint was brought in *London*. The defendant pleaded, that the plaintiff brought attaint against him of the same verdict in *Suffex*, and the sheriff returned that those of the petit jury were not within his bailiwick, by which the defendant went quit &c. Judgment &c. and it was held no plea, by which he answered over. Thel. Dig. 151. lib. 11. cap. 38. f. 8. cites Mich. 18 E. 2. Brief 827.

2. Attaint upon a verdict which passed before justices of oyer and terminer, the writ willed that the verdict passed before 4 justices, and the record proved that before 2; Herle said, we have no warrant to take the attaint, to which Hyll. agreed; quod nota; and so the attaint shall not be taken. Br. Attaint, pl. 47. cites 2 Aff. 5. 2 E. 3. 8.

The writ  
abated.  
Thel. Dig.  
77. lib. 9.  
cap. 1. f. 2.  
cites Pasch.  
2 E. 3. 31.  
and 2 Aff. 5.

3. In attaint brought by John, parson of the church of T. where in the first record he was named John Chaplain, parson of the church of T. The writ was abated for the Variance. Thel. Dig. 77. lib. 9. cap. 1. f. 2. cites 2 E. 3. 57. and \* 3 Aff. 17.

that the Court should abate it, though the party had not challenged it. But Brooke says, *quare* at this day, by reason of the statute of amendment made after the 14 E. 3.

\* Br. Vari-  
ance, pl.  
64. cites  
S. C. &  
S. P. and it  
was said,

4. In writ of entry he in reversion was received by default of the tenant for life, and pleaded release of the demandant, which was found false, and he brought attaint, and the writ did not make mention if the tenant for life was dead or not, and yet the writ awarded good, and yet it was said that the judgment differs in this case; for if he be alive the judgment shall be to restore him, as it

seems, and if not, then to restore the plaintiff. Br. Attaint, pl. 49. cites 4 Aff. 7. 4 E. 3. 54.

5. Attaint by P. against S. because P. brought writ of entry against S. who answered as tenant, and were at issue, and passed for S. and so P. brought the attaint, and because S. was not tenant the day of the attaint purchased, nor ever after, the writ was abated, and yet the attaint was freshly taken within half a year after the judgment in the first writ; but writ of error lies well against him who was party at the time of the judgment, albeit he had nothing in the franktenement at the time of the writ &c. Br. Attaint, pl. 51. cites 6 Aff. 6. 6 E. 3. 32.

6. In attaint the first record was of 2 parts of a house, and of certain land, and the writ of attaint was summones J. S. qui terram illam tenet, without making mention of the 2 parts, and therefore was abated by judgment, quod nota. Br. Variance, pl. 92. cites 7 Aff. 5.

7. If attaint bears date before the 4th day of the judgment in the first action, it shall abate, quod nota bene. Br. Attaint, pl. 54. cites \* 9 Aff. 21. 9 E. 3. 28.

Thel. Dig. 77. lib. 9. cap. 1. f. 4. cites S. C.

\* Br. Brief, pl. 266. cites S. C. for when parties have day in Court to hear their judgment upon verdict, the judgment shall not be given till the 4th day, quod nota. — Br. Judgment, pl. 57. cites S. C. and S. P. accordingly.

[ 265 ] 8. In attaint, the original is good if it agrees with the first record upon which the attaint is founded, though the first record varies from the first original; and so see that it shall agree with the first record, and not with the first original. Br. Attaint, pl. 58. cites 12 Aff. 2.

Adjudged good, because the attaint is founded upon the record, which is not defeated by error; but for this variance between the first original and the record, all the first record is reversible. Thel. Dig. 77. lib. 9. cap. 1. f. 5. cites S. C.

9. In attaint, the first original was of the manor of Austry, and the original of the attaint is Austry, and yet because the attaint and first record agreed it suffices; and so it was said there, that the attaint is founded upon the first record, and not upon the first original writ, and so good, though the original and the record of it vary. Br. Variance, pl. 66. cites 12 Aff. 2.

Contra in writ of error, for this is good against him who was party to the judgment, though he is not tenant of the franktenement. Ibid.

10. Attaint, because P. brought writ of entry against S. who answered as tenant, and they were at issue, which passed for S. and therefore P. freshly within half a year brought attaint against S. and because he was not tenant of the franktenement the day of the writ purchased, nor ever after, therefore the writ was abated by award, Br. Nontenure, pl. 28. cites 6 Aff. 6.

11. Attaint was brought in Bank upon assise of fresh force, the defendant pleaded that she had nothing in the land, but one B. judgment of the writ, and yet she was party to the assise of fresh force, and a good plea, and the plaintiff compelled to maintain the writ, because it may well be brought against the party to the first inquest,

quest, and against the tenant. Br. Attaint, pl. 32. cites 21 E. 3. 10.

12. Attaint, *N. recovered in præcipe quod reddat, and aliened to J. and he who lost brought attaint against both, and the writ was summoneas N. & J. qui terram illam tenet*; Skip. demanded judgment of the writ, for it should be *tenent*, and because N. was party to the first judgment and J. was sole tenant, the writ was awarded good; for *tenet* has relation to J. and not to both. Br. Faux Latin, pl. 28. cites 21 E. 3. 43.

13. In attaint *by tenant by his warranty* against an inquest, which passed between the demandant and the vouchee, whom the tenant vouched to warranty upon a deed, *quod quidem factum idem vocatus ad war. placitando protulit &c.* the writ was abated, because it was *not expressly supposed by the writ, that the vouchee had warranted to the tenant*, for it was not maintainable by indentment. Thel. Dig. 94. lib. 10. cap. 6. f. 8. cites Hill. 22 E. 3. 4.

14. Where the false oath passes *against the demandant and the tenant by his warranty*, the writ of attaint may be brought against the tenant of the land, and the tenant by his warranty jointly, by the demandant. Thel. Dig. 49. lib. 5. cap. 22. f. 1. cites Mich. 22 E. 3. 11.

15. In attaint brought *by the tenant against the vouchee*, exception was taken, that he *did not mention the voucher*; sed non allocatur. F. N. B. 106. (D) in the notes there (b) cites 22 E. 3. 11.

16. A man shall not have *one writ of attaint against 2 several inquests*. Thel. Dig. 106. lib. 10. cap. 15. f. 1. cites Pasch. 25 E. 3. 42.

17. The *death of none of the defendants* in the attaint shall abate the writ, *but the death of the tenant*, per French, *quod non negatur*. Br. Attaint, pl. 68. cites 26 Aff. 12.

seems to be law; for the death of one or more of the petit jury shall not abate the writ, for they are not named in the writ; for the writ is no more but *diligenter inquiras qui fuerunt juratores primæ inquisitionis &c.* [ 266 ]

But where attaint was brought against the defendant, upon a false verdict in an assise, who died pending the writ, the attaint does not abate by his death, by reason of the statute of 23 H. 8. cap. 3. on which the attaint was brought. D. 129. b. Pasch. 2 & 3 P. & M. Heydon v. Igrave.

18. In assise, the plaintiff was named *Jo. de Stoke*, and in the writ of attaint brought upon verdict passed in this assise, he was named *Jo. Stoke* without (de) by which the writ of attaint was abated. Thel. Dig. 77. lib. 9. cap. 1. f. 6. cites 26 Aff. 31.

dict found against him, brought an *attaint by the name of J. S. Knt.* and notwithstanding the variance the writ was held good, because it is a *new original*, and not founded merely upon any record. D. 25. pl. 161. Hill. 28 H. 8. Anon.

19. Where the first record was of *tenements in 4 vills*, and the writ of attaint of tenements in *3 vills*, leaving out one, yet it was adjudged good. Thel. Dig. 77. lib. 9. cap. 1. f. 7. cites Mich. 32 E. 3. Variance 72. Because the tenant in the first record has said,

Br. Brief, pl. 237. cites S. C. And Brooke says, it

Trespass was brought against J. S. of D. Knt. who after ver-

not in the mouth of one of the petit jury; per Rolfe.

*Quære.* Thel. Dig. 149. lib. 11. cap. 35. f. 15. cites Hill. 12 H. 6. 6.

The petit jurors cannot plead jointenancy of the part of the demandant.

Thel. Dig. 196. lib. 13. cap. 7. f. 3. cites Pasch. 21 E. 3. 16. 19 Aff. 15. Thel. Dig. 196. lib. 13. cap. 7. f. 4. cites Mich. 12 H. 6. 6.

A petit juror pleaded that one of the plaintiffs was out-

lawed in action personal. Sed non adjudicatur. Thel. Dig. 196. lib. 13. cap. 7. f. 7. cites Mich. 21 H. 7. 7. *Quære.*

Nor that *feme demandant* is a *feme covert*. Thel. Dig. 196. lib. 13. cap. 7. f. 3. cites Pasch. 21 E. 3. 16. 19 Aff. 15.

*of attaint purchased &c.* but several held that the plea did not lie in his mouth. Thel. Dig. 196. lib. 13. cap. 7. f. 4. cites Mich. 12 H. 6. 6.

8. It was held, that petit jurors should *not have any plea to the land, or which arises from the land* as jointenancy, nontenure &c. Thel. Dig. 196. lib. 13. cap. 7. f. 4. cites Mich. 12 H. 6. 6.

9. But pleas which go *to the person*, he shall have, as coverture &c. Thel. Dig. 196. lib. 13. cap. 7. f. 4. cites Mich. 12 H. 6. 6.

10. One of the petit jury cannot *say that the sheriff has returned one to be of the petit jury who was not one of the petit jury.* Thel. Dig. 196. lib. 13. cap. 7. f. 8. cites Mich. 18 H. 8. 2.

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Vol. 285.

## (N) What shall be a good *Bar*.

\* Fitz. Darrein Presentment, pl. 1. cites Pasch. 22 E. 3. 6. S. C.

† Br. Attaint, pl. 75. cites S. C. & S. P. admitted. — Br. Nonsuit, pl. 39. cites S. C. & S. P. — Br. Peremptory, pl. 59. and in pl. 29. cites S. C.

‡ Br. Attaint, pl. 63. cites S. C. that by this the party is discharged for ever, and so peremptory. — Br. Peremptory, pl. 29. cites S. C.

[1. IF the *plaintiff in an attaint* after appearance be *nonsuit*, this will be a good bar in a new attaint. \* 22 E. 3. 7. † 32 Aff. 13. ‡ 19 Aff. 13. adjudged. 20 E. 3. Attaint 43.]

Br. Attaint, pl. 71. cites S. C. & S. P. for per Shard. upon

discontinuance no judgment is rendered as there is upon nonsuit, and so they are not alike; and Brooke says, quod nota; and so see that discontinuance is not peremptory in attaint as nonsuit is. — Br. Nonsuit, pl. 39. cites S. C. & S. P. accordingly, and says, note the diversity, and that 19 Aff. 13. is accordingly. — Thel. Dig. 153. lib. 11. cap. 38. f. 3. cites S. C. — Br. Peremptory, pl. 59. cites S. C.

Br. Attaint, pl. 74. cites [ 269 ] S. C. in which case a ven. fac. was awarded, and no day given to the parties, and when the inquest was taken it was not supposed that the parties were present; sed non allocatur; because for any thing that appears the defendant had judgment and execution upon the first record.

[3. It is not any bar of an attaint *to allege a discontinuance in the process of the recovery*, for this is a record and judgment in force till it be reversed, and the defendant had execution thereupon. 32 Aff. 12.]

[4. In

[4. In an attaint brought by the issue in tail upon a verdict in a former action against his ancestor, the release of the ancestor is not any bar, for the attaint is intailed as well as the land itself. 14 E. 3. Attaint 41. adjudged.]

if he had released *all his right*; quod nota; and from hence it appears that *such release of tenant in fee simple* shall be a bar to the heir. Br. Releases, pl. 80. cites F. N. B. 108.—Br. Taille & Dones &c. pl. 42. cites S. C.

S. P. Br. Releases, pl. 80. cites F. N. B. 108. and that so it is

5. Attaint against him who recovered and 2 others who hold that land; the 2 said that they had nothing; & non allocatur; and therefore it seems that nontenure is no plea in attaint, and yet sometimes it is suffered. Br. Nontenure, pl. 31. cites 10 Aff. 8.

In attaint, the defendant pleaded *generally* nontenure, and if found that

it be not &c. that they made a good and lawful oath &c. and admitted without challenge. Br. Nontenure, pl. 35. cites 16 Aff. 5.

Nontenure in attaint is a good plea, for the action does not lie till he who recovers takes execution; for before this the party is not grieved. Br. Attaint, pl. 13. cites 35 H. 6. 39. 26 H. 8. 1. per Wangf.—Br. Attaint, pl. 98. cites 31 H. 6. 12. contra that nontenure pleaded by the first party who recovered in the assise is no plea; for it shall be intended that he remained tenant.

But it seems, that where a man is barred by false verdict, and brings attaint, there nontenure is no plea against privies; contra between strangers, as where the tenant infeoffs a stranger. Br. Attaint, pl. 13. cites 35 H. 6. 39. 26 H. 8. 2. per Wangf.

He that pleads nontenure shall have an attaint. 40 Aff. 20. 21. per Fitzh. and therefore where the party himself pleaded nontenure of parcel the plaintiff was driven to maintain his writ. 21 E. 0. See in an attaint brought against him who recovered nontenure held no plea 8 E. 4. 19. viz. if he has once execution, per Prifot; 35 H. 6. 44. See 10 Aff. 8. 31 H. 6. 12. 26 H. 8. 2. yet see in an attaint by him who was plaintiff against him who was tenant in the original, nontenure held a good plea, except the plaintiff had freshly sued. 6 E. 3. 32. 21 H. 6. 51. per Ascue &c. but it is there agreed, that nontenure is a good plea against him who recovers. F. N. B. 107. (1) in the new notes there (e) and (K) in the new notes there (d).

Attaint by T. against R. because R. had recovered against him in assise by false verdict, and took execution, and the defendant pleaded nontenure, and admitted a good plea, and the plaintiff maintained his writ by perjury of the profits; and so see that nontenure in attaint is a good plea. Br. Nontenure, pl. 22. cites 21 H. 6. 55.

6. In attaint, the tenant shall not have advantage to say that one of the petit jury is left out in the suit before the grand disjurers, for the attaint against them was awarded by their default before. Br. Attaint, pl. 59. cites 14 Aff. 2.

7. The defendant said, that where R. brought the attaint, he had nothing at the time of the assise brought but in common with B. and D. who are alive not named in the attaint; judgment of the writ, and if found that it be not, then they have made good oath; quod nota; that he pleaded over to the jury as above by award of the Court. Br. Attaint, pl. 69. cites 27 Aff. 61.

8. In assise several tenancy is no plea, nor in attaint founded upon it; for in assise, if the one be tenant and the other had nothing, this suffices; quod nota bene. Br. Aff. 311. cites 30 Aff. 24.

9. If the one of the defendants attaints the petit jury, they shall not be *auterfoits* attaint; for their land shall be wasted and extirpated by the first judgment; per Moyle; quære. Br. Attaint, pl. 9. cites 34 H. 6. 12.

10. In attaint, the defendant who first recovered said, that a long time before the same recovery, this same plaintiff infeoffed J. N. *But it is a good plea that the estate*

*plaintiff of estate he has, and no plea; for this is to destroy his own recovery, which cannot be.* Br. Attaint, pl. 11. cites 34 H. 6. 43. *ed J.N. Que estate he has.* Ibid.

4 Le. 135.

pl. 272.

cites S. C.

— 1 Rep.

111. b. cites

S. C. Arg.

and says that

in attaint

and disseit

the actions are extinguished by feoffment of the land, and yet they are collateral to the right of the land, and no land is demanded by them, but are only to reform the erroneous proceeding, the false oath &c. but because by a mean the possession and inheritance may be divested thereby, those actions are extinguished by the feoffment.

But if at-

taint is

brought by

several de-

fendants,

the release of one shall not bar the others; for they are forced to join. Jenk. 272. pl. 89. — 6 Rep. 2 c. b. 26. in Ruddock's Case, cites it as adjudged accordingly, where damages were recovered against several in writ of conspiracy. 35 H. 6. 19. a.

11. Where *J. N. infeoffed W. who infeoffed D. who is disseised by this same J. N.* again, and a stranger recovers against *J. N.* and *E. enters*, as he well may, upon feint recovery, and *J. N. brings attaint*, it is a good plea to plead this matter, and the recovery mesne between the disseisin made to *D.* and his re-entry. Br. Attaint, pl. 11. cites 34 H. 6. 43.

12. If the tenant pleads release, the attaint shall not be taken; per Prisot; for it seems that it shall be tried by the petit jury. Br. Attaint, pl. 13. cites 35 H. 6. 39. 26 H. 8. 2. per Wangf.

13. It is no plea to say that the plaintiff in the attaint has entered after the last continuance in attaint. Br. Nontenure, pl. 22. cites 20 H. 8.

See tit.

Accord (B).

## (O) What Pleas the Petit Jury may plead.

S. P. that

he can plead

no other

plea, unless

it be release

of action,

or the like;

but cannot plead any plea to the writ as jointenancy, or that the feme plaintiff had taken

baron pending the writ, or e contra, and the like. Br. Attaint, pl. 33. cites 21 E. 3. 15.

\* Fitzh. Attaint, pl. 61 & 65. cites 12 H. 6. 5. S. C. but I do not observe the point of either of these two pleas there.

[1. THE petit jury can plead no plea, but such as may excuse them of the false oath. \* 12 H. 6. 6.]

[2. The petit jury can not plead that the plaintiff in the attaint was tenant after the attaint purchased. 12 H. 6. 6.]

3. Attaint was brought upon appeal of maihem. The defendant pleaded release of execution mesne between judgment and execution, and one of the petit jury pleaded arbitrement by submission made between the plaintiff and defendant, and a good plea; per Danby; for he may plead release made by the plaintiff to the defendant, and all pleas which go in excuse of the false oath, and the punishment ordained for it; and so see that it is admitted there that attaint lies upon appeal of maihem, and see now the new statute 23 H. 8. 3. of attainments; and see if this statute does not serve to have appeal of maihem upon, though the law was otherwise before. Br. Attaint, pl. 12. cites 35 H. 6. 30.

\* S. P. Br.

Attaint, pl.

218. cites

4. In attaint one of the petit jury pleaded \* accord made between the plaintiff and the defendant, with a satisfaction, and by some

some it is no plea; for it is *matter in fact* pleaded against *matter of record*; and by *some e contra*; for the *action is not founded only upon matter of record, but upon matter in fact and matter of record*, viz. the record and the false oath. And quære if the petit jury may plead that which is between the plaintiff and the defendant; and by the best opinion he shall have the plea. Quære. Br. Attaint, pl. 91. cites 13 E. 4. 1.

13 E. 4. 5. where it was held a good [ 271 ] plea per tot. Cur. except Lacon, and yet they are in a manner strangers;

and it seems a good plea, though it be *matter in fact*, and the attaint is founded upon *matter of record*; for the cause, viz. the false oath, is *matter in fact*; for it is not of record if the oath be false, or not till it be tried; and in *trespass, conspiracy, & contra formam collationis, there is privy*; for the one shall plead release made to his companion; *contra in appeal and premunire.*—Br. Accord, pl. 9. cites S. C.——S. C. cited per Cur. 6 Rep. 44. a. Mich. 3 Jac. C. B. in Blake's Case.

5. In attaint the petit jury cannot *assign error in the original*; for it is *not party to the record*, but ought to answer to the false oath. Br. Attaint, pl. 93. cites 18 E. 4. 9.

6. Attaint *by two* upon assise passed against them, and *one of the petit jury pleaded outlawry in one of the plaintiffs before the date of the assise*, and held that he cannot have it; for he *cannot have plea but in maintenance of his verdict, or in bar*, and not *plea to the writ*, as to say that the writ is *brought pending another writ of attaint of the same matter, or that the feme plaintiff was covert baron*, her baron not named &c. Br. Attaint, pl. 85. cites 2 H. 7. 7.

7. In attaint *at the distringas one of the petit jury said that the defendant is dead*, and a good plea for him, per Cur. For now the plaintiff cannot have judgment against him, nor he restored. Br. Attaint, pl. 2. cites 18 H. 8. 5.

8. In attaint upon a writ of trespass, one of the petit jury pleaded *a concord between the plaintiff in the attaint and the defendant*, and this was held a good plea in 13 E. 4. by the better opinion; and in all actions founded upon a tort, as trespass, conspiracy, maintenance &c. where nothing certain is demanded, nor to be recovered, besides damage, concord is a good plea. D. 75. b. pl. 27. Mich. 6 E. 6.

## (O. 2) Proceedings, and Return of Sheriff.

1 *Westm. 1. cap. 42.* ENACTS, that in *attaints the tenant after appearance shall not be essoigned.*

3 E. 1.

Though essoign here is spoken indefinitely,

yet it is to be taken in a common sense, and to be understood of a common essoign, and not of an *essoign de servitio Regis.* 2 Inst. 249.

2. In attaint the tenant would have rendered the action, and the Court would not receive it without taking the jury for the advantage of the King, and also land, is not in demand by this writ. Br. Surrender, pl. 30. cites 6 Aff. 2.

3. In attaint it was said by the clerks, that *at every day in attaint and assise the entry is quod ideo vicecomes habeat corpora &c.* and yet distress shall issue against the jurors by their default, and because judgment shall not be given till the 4th day, therefore if

*the attaint bears date before the 4th day of the judgment in the first action, it shall abate; quod nota bene.* Br. Attaint, pl. 54. cites 9 Aff. 21. 9 E. 3. 28.

In attaint upon a verdict in the Exchequer, the parties were at issue quod bonum fecerunt sacramentum.

4. *Affise was arraigned before T. and after before F. and B. by new commission, and the party brought attaint, and the original and the patent, and all except the new commission was there, and for want of this, Scot advisare vult in the taking of the attaint; and so see that all the records ought to be there.* Br. Attaint, pl. 62. cites 17 Aff. 23. 18 E. 3. 26.

At the day of trial the grand jury appeared, but the record was not removed hither. The Court agreed that no day shall be given to the plaintiff to bring in the record; for he ought to have done it at his peril. Adjudged quod querens nil capiat, and that defendant and jurors cant inde sine die; and \* a fine put upon the plaintiff. Cro. E. pl. 54. Mich. 40 & 41 Eliz. B. R. Anon.

\* Orig. is (no fine), but seems to be misprinted.

5. In attaint, the defendant was returned nihil, and the plaintiff prayed the jury, and could have only re-summons, and if he be returned summoned upon the original, and makes default, yet the plaintiff shall have only re-summons; and the opinion there was, that he ought to be summoned, by which the plaintiff said that he had land in another county, scilicet, T. and prayed to summon him there, and had it. Br. Proces, pl. 95. cites 21 Aff. 5.

6. In attaint, the sheriff returned the defendant nihil, the plaintiff prayed the attaint, but the Court said, you cannot before re-summons [but the counsel of the plaintiff replied that] he could not have it served, for he is returned nihil, so the Court bid them take process upon testatum in another county, by which he said that he had sufficient in another county [to be summoned by] and prayed process there, and had it; quære if he may not be summoned in the land demanded? But this attaint was not of land, but upon action of quare incumbravit; and 21 Aff. 5. the opinion is, that the defendant ought to be summoned; but quære, if he has nothing in any place. Br. Attaint, pl. 34. cites 21 E. 3. 18.

7. In attaint the tenant and 8 of the petit jury came, and maintained the first oath, and upon this the jury awarded, and it was awarded by default against 4 of the petit jury who did not come, and by this they have lost their challenge to the 24. Br. Attaint, pl. 65. cites 22 Aff. 31.

8. In attaint the writ is, et diligenter inquiras qui fuerunt jurat: primæ inquisitionis, and the sheriff returned their names, and that 10 are dead, and 2 are alive qui nihil habent; and in the first panel was M. B. Knight, and he returned M. B. dead, without mentioning Knight; Knivet said, therefore it might be taken for another person, and because it shall be intended the same M. B. who was of the first jury, therefore the return was awarded good. Br. Attaint, pl. 76. cites 34 Aff. 6.

9. Attaint was brought upon a verdict in formedon, the record was removed, and the original, the record and the mittimus were examined, and Knivet took exception, because writ ought to have been awarded to the clerk for the venire facias, and the panel, for this remains



remains with him, and not with the justices, therefore it is not sufficient to write to the justices for the record, and if it be here it is without warrant; per Thorpe, the writ is *mittimus vobis recordum & processum cum omnibus ea tangentibus*, and this is sufficient for us, and therefore ordered him to answer, quod nota. Br. Cause, pl. 23. cites 34 Aff. 6.

10. In attaint the tenant made default, Finch. prayed *pone per vadios* against him, and summons against the jury, and could not have but only re-summons as in mortdancestor. Br. Attaint, pl. 77. cites 37 Aff. 3.

and made default at the day, by which the attaint was awarded by default; for he shall not have re-summons but immediately upon the return of the summons. Br. Attaint, pl. 92. cites 18 E. 4. 8. and P. 4. H. 6. 23. Fitzh. Mortdancestor 1. — Br. Process, pl. 119. cites S. C.

In attaint at the summons returned, the tenant was assigned,

11. Attaint in the county of Middlesex upon inquest, which passed for T. now defendant in præcipe quod reddat; after the petition cape T. alleged imprisonment at Westminster, and the attaint was brought in Middlesex, and the sheriff returned that the defendant had nothing whereby he might be summoned; Chelr. prayed the jury by default, and could not have it, but writ of summons was awarded to the sheriff of the county of Wilts, where the first land was in demand, against the said T. Br. Attaint, pl. 81. cites 42 Aff. 14.

Br. Process, pl. 104. cites S. C.

12. In attaint, the sheriff returned 11 of the names of the petit jury, and another who was not of them, scilicet, R. B. where R. P. was the 12th of the petit jury, and the defendant pleaded it to the writ, & non allocatur, nor the sheriff shall not be amerced; but process shall issue at the prayer of the party against him who is admitted, and the writ shall stand against the others by the best opinion; for the words of the writ are no more, but that you diligently enquire who were jurors of the first inquisition. Br. Attaint, pl. 19. cites 48 E. 3. 15.

Br. Return de Briefs, pl. 115. cites S. C.

13. In attaint the jury demanded if they might give the verdict at large, as in assise, and the justices said, No. Br. Attaint, pl. 87. cites 7 H. 4. 29.

14. And there it is said, that where action is brought against two, and the one is summoned and severed, and the other sues forth, and after writ of error is brought, not making mention of him who was summoned and severed, the writ shall abate, quod non negatur. Br. Error, pl. 7. cites 9 H. 6. 38.

An attaint as well as a writ of error, shall follow the nature of the action upon which

it is founded; so that if summons and severance lies in the first action, it shall do so likewise in the attaint. 6 Rep. 25. a. Trin. 41 Eliz. B. R. in Ruddock's Case, cites 34 H. 6. 42.

15. Execution of the first recovery shall be sued, notwithstanding that attaint be pending. Br. Attaint, pl. 7. cites 33 H. 6. 21.

16. In writ of error sued, the plaintiff shall have *supersedeas* to surcease examination, and in attaint not; for it shall be intended that the verdict of the 12 jurors is true, till the contrary be shewn. Br. Attaint, pl. 122. cites 5 H. 7. 22.

17. In attaint the grand jury and petit jury made default in the

end of the term, and the defendant would have imparled, and was not suffered, but was awarded to answer to the points of the writ, and could not have day of continuance without issue. Br. Attaint, pl. 129. cites 10 H. 7. 22.

Br. Return  
de Brief, pl.  
1. cites S.C.

18. In attaint the sheriff cannot return the defendant dead, for there are no words of the garnishment in the writ. Br. Attaint, pl. 2. cites 18 H. 8. 5.

19. The jurors who are attainted, may remove the record into B. R. Br. Attaint, pl. 100. cites F. N. B. 109. 110.

20. In an attaint it is a principal challenge that one of the petty jury is a tenant to one of the grand jury; for if the petty jury be convicted in the attaint, it will be a great prejudice to the feignory; for his houses shall be pulled down, and his meadows plowed up. In other actions a challenge that the juror is lord to the party, is only a challenge to the favour. Jenk. 141. pl. 88.

### (O. 4) Tried. How. By 12 or 24. Where.

S. P. Br.  
Attaint, pl.  
38. cites  
21 H. 6. 55.

1. **A**TTAINT was brought in Bank upon assise of fresh force, and because they were at issue here upon the tenancy, and out of the point of attaint, therefore it shall be tried by 12, and not by 24. Br. Attaint, pl. 32. cites 21 E. 3. 10.

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2. In attaint against the tenant and the petit jury the writ was returned against the tenant that he was warned, and that those of the petit jury were attached. The tenant was effoigned, and the others made default. Markham prayed the grand jury for default of the petit jury, as in assise or juris utrum, which was denied him, and process made against them, because this effoign is given by the Statute of Westm. 2. cap. 27. Br. Attaint, pl. 37. cites 21 H. 6. 42.

### (P) Evidence.

S. P. as a  
release,  
which was  
not pleaded  
nor given in  
evidence be-  
fore, shall not be given in evidence to the grand jury.

[1. **I**N an attaint more evidence cannot be given to attaint the first jury than was given to the first jury; for no default was in the first jury, if it was not shewn to them. D. 34 H. 8. 53. 14. 4 El. 212. 2 M. 129.]

Br. Attaint,  
pl. 87. cites  
S.C. & S.P.

[2. In an attaint the plaintiff can not give in evidence a record which was not given to the petit jury; for they were not bound to find it, if it was not shewn to them. 7 E. 4. 29. b. per Litt. 8 E. 4. Attaint 9.]

And if the  
defendant  
in attaint  
gives new  
matter in  
evidence to  
enforce the

3. The plaintiff in attaint may not produce more witnesses, nor give further matter in evidence than what was deposed in the first action; but the defendant in attaint may give more in affirmance of the first verdict. Agreed for law. D. 53. b. pl. 14. Trin. 34 H. 8. in Case of Rolfe v. Hamden.

**Just verdict**, the plaintiff in attaint may make answer thereto, and disprove it if he can; but shall not give \* other evidence, or enforce the evidence first given, with matter not given or disclosed before. Agreed for law. Dy. 212. a. pl. 34. Pasch. 4 Eliz. Paramor's Case.

\* S. P. accordingly per Cur. obiter. Godb. 271. pl. 38. Hill. 15 Jac. B. R.

^ The Court said that they always examine the witnesses upon their oath, whether they gave the same evidence on the first trial or not, [as they give now on the attaint]. And per Shelley, if the first jury had full evidence to prove the matter, though it were false in fact, yet the grand jury in the attaint ought not to regard that, but in conscience ought to waive it, as they would have done upon such good evidence as the first jury did. D. 53. b. 54. a. pl. 15. 16. Trin. 34 H. 8. in Case of Rolfe v. Hampden.

4. In assise issue was taken whether lands were contained in letters patents or not, which by the common law were not contained, though by the statute of 4[35]H.8. they were contained. The justice of assise would not suffer that statute, it not being pleaded, to be given in evidence to the jury; whereupon they found that the land was not contained. Hereupon an attaint was brought, and the Court would not suffer that statute to be given in evidence to the grand jury which was not given in evidence to the petit jury. Hob. 227. cited by Hobart Ch. J. as D. 129. 2 & 3 P. & M. Igrave v. Heydon.

D. 125. b. pl. 65. S. C. —Hob. 227. the Ch. J. says that though it were a general law, yet the judges did discreetly to bar it to be given in evidence to

the grand jury, because it was not just to attaint the petit jury by what was concealed from them by the discretion of the Court; but he says that legally it will be hard to acquit a jury that finds against the law, either common or general statute law, whereof all men are to take notice, and whereupon verdict is to be given whether any evidence be given to them or not. As if a feoffment or devise were made to one in perpetuum, and the jury should find cross either an estate for life, or in fee-simple against the law, they should be subject to an attaint, though no man informed them what the law was in that Case.

5. The judgment was so severe that they allowed all manner of evidence in support of their verdict; but against the verdict they admitted none that was not given at the former trial, because the jury might give in their verdict not only on the evidence given in Court, but on their own knowledge, and therefore whatever other ways they came to the knowledge of [as to] the fact, they might give in evidence for the support of their verdict; but the evidence not offered on the trial can never be brought against them, because such evidence might have altered their judgment, had it been given; and the want of that light, which the party neglected to offer, cannot convict them of a falsity, which, if it had been offered, might have founded a different verdict. G. Hist. of C. B. 57. [ 275 ]

## (Q) Judgment.

[1. IF the petit jury be convicted in an attaint, the judgment shall be that they be out of the law and testimony, and their goods and chattels forfeited, and their wives and children thrown out of their houses, and their lands and tenements wasted and destroyed, and their lands seised into the King's hand. 20 H. 7. 4. \* 8 H. 4. 23. b. † 42 E. 3. 26. b. † 46 E. 3. 23. ¶ 6 E. 4. 7. ¶ 14 H. 7. 13. b, libro Fortescue 26.]

\* Fitzh. Attaint, pl. 14. cites S. C. & S. P. accordingly; but Gascoign said that the jurors might make fine,

and save their lands and tenements. —Br. Attaint, pl. 26. cites S. C. & S. P. accordingly.

† Br. Attaint, pl. 14. cites S. C. and that the jurors shall be imprisoned. — Fitzh. Judgment, pl. 9. cites S. C. & S. P.

† Br. Attaint, pl. 18. cites S. C. & S. P.

† Br. Attaint, pl. 8. cites 6 E. 4. 5. S. P. and is the S. C.

|| Br. Attaint, pl. 42. cites S. C. but I do not observe S. P. there. — S. P. pl. 52. cites 6 Aff. 7. and pl. 7. cites 30 Aff. 24. and pl. 7. cites 40 Aff. 20. as to the jurors that are alive; and pl. 8. cites 41 Aff. 18. that their *houses* shall be pulled down. — Jenk. 125. pl. 54. recites the punishments to be inflicted by judgment at common law; but says that if an attaint be brought upon the statute of 23 H. 8. cap. 3. the punishment is not so grievous.

If the *petit jury* in attaint are attainted, they shall forfeit all their goods and chattels which they had at the day of the writ purchased, and all their goods which they aliened pending the attaint, for fear of the attaint. Br. Forfeiture de Terres, pl. 111. cites 8 E. 2. and Fitzh. Affise, 396. per Hervey J. — Br. Exposition, pl. 43. cites S. C.

It is questioned, if the jurors alien their lands pending the attaint, if they shall be seised into the hands of the King, and if the jurors may not make fine with the King, and re-have their land &c. — Br. Attaint, pl. 14. cites 42 E. 3. 26.

In attaint upon affise upon false oath, the plaintiff recovered the land and his damages. Br. Damages, pl. 48. cites 8 H. 4. 21. 23. and in the written book which is better, fol. 12.

[2. Such judgment in effect throughout is given in an attaint by the law of Scotland, quod vide Skene, regiam majestatem, 20. b. 2 E. 2. Rot. finium membrana 9. Fine for a conviction upon an attaint, for an oath in an affise of novel disseisin. Tempore E. 1.]

S. P. but of the part of the plaintiff, if the verdict passed against him in the first action, and for him in the attaint, the judgment shall only be to restore him to his action; per Danby and Choke. Quere inde. Br. Attaint, pl. 88. cites 8 E. 4. — By writ of error the party may be restored to his original; but in attaint he shall be always restored to his action only. Br. Attaint, pl. 4. cites 9 H. 6. 38. per Babb.

[3. If a man recovers in an attaint, he shall be restored to all that he lost by the verdict.] If judgment be given for the plaintiffs, they shall be restored to all that they lost; and it shall be as it ought to be originally. Jenk. 125. pl. 54.

[276] [4. [As] If a man recovers in an attaint upon a verdict in an action, in which he lost land, he shall be restored to the land again. \* 50 Aff. 4. † 41 Aff. 18.]

\* S. P.

† Br. Attaint, pl. 80. cites S. C. & S. P. — Fitzh. Attaint, pl. 81. cites S. C. & S. P. — Br. Attaint, pl. 72. cites 30 Aff. 24. S. P. — Br. Attaint, pl. 94. cites 18 E. 4. 11. S. P.

Br. Attaint, pl. 84. cites 50 Aff. 4. S. P. — [5. [So] If a man recovers in an attaint upon a verdict, in which he lost damages, he shall be restored to them.]

Br. Attaint, pl. 27. cites 30 Aff. 24. S. P.

N. B. There is no pl. 6. in Roll.

[7. If a man recovers in an attaint upon a verdict, in which he lost land, he shall be restored to the mean profits. 50 Aff. 4.]

Br. Attaint, pl. 84. cites S. C. and S. P. — Br. Attaint, pl. 72. cites 30 Aff. 24. S. P. — Ibid. pl. 94. cites 18 E. 4. 11. S. P.

[8. If a man brings a formedon, and the tenant pleads a release, and it is found for the defendant, for which the demandant brings an attaint, and the false oath is found, he shall have judgment to recover the land. 8 E. 4. Attaint 8.]

[9. So

[9. So if a man *brings debt and is barred*, and he brings an attaint, and it is found for him, he shall *recover his debt*. 8 E. 4. Attaint 8.]

Br. Attaint, pl. 88. cites S.C. & S.P.

[10. If the *issue in tail recovers the land* in an attaint upon a recovery against his ancestor, he shall *recover the issues of the land from the death of the ancestor*. 41 Aff. 18.]

Br. Attaint, pl. 80. cites S.C. & S.P.

11. Attaint passed for the plaintiff, and judgment was, that the plaintiff *re-have his land, and damages taxed by the attaint to 1000 marks*, and that the 12 &c. Br. Attaint, pl. 48. cites 4 Aff. 2. 4 E. 3. 34.

12. In writ of entry he in *reversion was received by default of the tenant for life, and pleaded release of the demandant, which was found false*, and he brought attaint, and the writ did not mention if the tenant for life was dead or not, and yet the writ was awarded good, and yet it was said, that the judgment differs in this case; for if he be alive the judgment shall be to restore him, as it seems, and if not, then to restore the plaintiff. Br. Attaint, pl. 49. cites 4 Aff. 7. and 4 E. 3. 54.

13. Attaint was adjourned by nisi prius before S. and T. to Canterbury, and found against the petit jury, and it was awarded that W. who lost re-have his land, and damages taxed to 1000 marks, and that they lose their frank law &c. Br. Attaint, pl. 52. cites 6 Aff. 7.

14. In this action a man shall not have seisin of the land against the tenant upon his plea, but the attaint shall be awarded at large, and if the attaint passes for the plaintiff he shall recover seisin, and his damages and the issues of the land after the death of his ancestor. Br. Attaint, pl. 59. cites 14 Aff. 2.

15. In attaint all of the first inquest appeared, and the plaintiff was nonsuited, by which it was awarded that they go fine die, and the plaintiff capiat, and the pledges amerced; and per Pole, now the party shall be discharged for ever, and so peremptory. Br. Attaint, pl. 63. cites 19 Aff. 13.

16. Audita querela passed for the plaintiff, and therefore the defendant, who was consuee in the statute merchant, brought attaint; Thorp answered, that it did not appear that the plaintiff in the attaint ever had execution of any land delivered to him, so cannot have attaint, and the Court contra to him, and that he shall have attaint as well as if he had had execution in fact, and that if the attaint now passes for the plaintiff, then he shall have execution now, and therefore the grand jury was adjudged by award; and so see, that if the plaintiff has had execution before, then the judgment in the attaint shall be that he have restitution of that which he lost; but now the judgment shall be that he have execution. Br. Attaint, pl. 64. cites 21 Aff. 16.

And so it seems, that in attaint such judgments shall be given as ought to have been given, in case the first jury had given true verdict. Ibid. — S. P. Jenk.

271, 272. in pl. 89.

17. In attaint, if the plaintiff be nonsuited or barred, he shall be fined and imprisoned. 8 Rep. 60. per Cur. cites 32 Aff. pl. 9. 42 E. 3. 26. b.

Jenk. 229. pl. 96. S.P. that he shall be fined and

ransomed;  
and that the  
ransom is  
treble to the  
fine. —

D. 232. pl. 6.  
Mich. 6

& 7 Eliz.

S. P. accordingly. — But where the *defendant* in the attaint is *not party* to the original writ in the cause in which the false verdict was given, he *shall only be amerced*. Jenk. 229. pl. 96.

18. So if the attaint passes against the *defendant*, he shall be *fined and imprisoned* if he was party to the first record; but if he was not party to the first record, as if he was *tenant by rescuit*, or other *tertenant*, he shall *not be fined*. 8 Rep. 60. a. cites 14 Aff. 2. 42 E. 3. 26. b. 9 E. 4. 33.

19. Upon finding the false oath in attaint the *tenant* was amerced, but was *not awarded to prison*, because it was *not this person who recovered* by the first verdict, but he who recovers by false verdict, and comes and maintains the false oath shall be awarded to prison &c. Br. Attaint, pl. 80. cites 41 Aff. 18.

And the  
reason why  
the plaintiff  
did not re-  
have the  
damages  
in assise was,  
because the  
baron of the  
feme now  
defendant  
recovered in  
the assise,  
and he was  
now dead.  
Br. Ibid.

20. Attaint was brought against *tenant in dower*, who prayed aid of the heir, and had it, and the attaint passed against the *defendant*, and it was found that 12 years are passed after the death of the baron of this feme, who *auterfoits recovered in assise*, and during 6 years after his death the land was in the hands of the King for nonage of the heir, who joined in aid, by which judgment was given that the plaintiff recover the land, and the issues of the land from the time that the land came out of the hands of the King to 20l. and the damages after this time 10l. and [as] to the damages which the plaintiff in the attaint lost in the assise they would not speak, and that the feme and the prayee in aid shall be amerced, and that the jury shall lose their frank law &c. Br. Attaint, pl. 14. cites 42 E. 3. 26.

21. In attaint the grand jury gave verdict *quod bonum & legale fecerunt sacramentum*, by which it was awarded that the plaintiff take nothing by his writ, and that he be in *misericordia & quod capiatur* &c. Br. Attaint, pl. 83. cites 43 Aff. 46.

22. Attaint was brought by baron and feme, of false oath, given against the feme and her first baron in quare impedit, and awarded good, and the plaintiff recovered the advowson in right of the feme, and damages to 24 marks recovered in the first writ against him who first recovered the presentation alone, and 26 marks for damages in this action against him who first recovered, and another who pleaded nontenure of the advowson, which was found against him, and these 26 marks were recovered against them in common, and that those of the petit jury lose their frank law &c. Br. Attaint, pl. 18. cites 46 E. 3. 23.

23. The vouchee shall have attaint, and by this the *tertenant* shall be restored; quod nota, for he is as one and the same tenant. Br. Attaint, pl. 25. cites 8 H. 4. 4.

24. Attaint shall not ensue the nature of the action upon which it is brought, for they shall not enquire but their issue only, by which it was awarded (because the false oath is found) that the plaintiff recover seisin of the land and damages, scilicet, the issues of the land from the time of the disseisin till now, and his costs, as well in the assise as in this writ, the which, because they were taxed too little, were increased by the Court, and the jurors in assise lost their *chattels*

*ebattels &c.* But this now tenant was not taken because he was a stranger to the assise; for it was against tenant, and the others as it ought, for the attaint shall be against tertenant. Br. Attaint, pl. 26. cites 8 H. 4. 23.

25. By the attainer of the petit jury, the King shall not have the forfeiture of the land to him in fee simple, if it may escheat to the lord after, (as by the principal Case it appears it may) but shall have it for life of the juror, as it seems, and then the heir shall have it, and shall hold scut prius, or the juror may make fine and re-have his land. Br. Attaint, pl. 95. cites \* 22 E. 4. 1.

26. Quære if a stranger be tenant if he shall be ousted without scire facias. Br. Attaint, pl. 98.

27. The jury when impanelled judged under the penalty of an attaint in the old law, as appears by Glanville; if a false judgment was given in the Court below, and they were arraigned for this false judgment in the King's Court, they were obliged to wave the battle, not by an extraneous person, but by one of themselves; and if they proved recreant, they lost liberam legem, the lord lost his Court, and the whole Court was in misericordia. Glan. lib. 8. c. 9. fo. 66. Instead of this, came the Norman way by a grand jury of 24; but the persons if convicted were under the same disabilities with a champion recreant in such case, for they lost liberam legem, and they received the villainous judgment which every champion received, that maintaining another's right by battle failed; for their verdict was the asserting of the right of the person, for whom it was given. G. Hist. of B. 56, 57.

For more of Attaint in general, see other proper titles.

## Attorney or Guardian.

(A) What Persons ought to make a Guardian.  
[Or what Actions must be prosecuted by Guardian, or may be done by Attorney.] [Infant or Feme Covert.]

Fol. 287.

See tit. Appeal (C).

[1.] IN an action real and mixt against an infant, he ought to appear by guardian, and not by attorney. P. 15 Car. B. R. between

between *Lewis and Johns* adjudged per Curiam in a writ of error, and the judgment in an ejectione firmæ in *Banco* against the infant defendant upon a verdict had against him, reversed for this cause, intratur M. 13 Car. B. R. Rot. 266.]

\*See tit. Guardian, (A. 2.) per tot.

†Fitzh. Infant, pl. 3. cites S. C. by Hull, that infant cannot make or be made an attorney. ‡Br. Attorney, pl. 46. cites S. C. which see

infra, pl. 7. —Bridgm. 74. Bridgman J. cites S. C. and 9 Eliz. Dyer 262. b. [pl. 4].

§ Sec (C) pl. 1. S. C. and the notes there.

\*Cro. E. 569, pl. 5. *Sedborough v. Raunt*, S. C. and judgment reversed by Gawdy and Fenner [279] J. ceteris absentibus; for Gaudy said that if he was within age at the time of the judgment given, though he was not so at the time of the error brought, it is reversible, and is triable per pais, and not like an error upon a fine, or a statute acknowledged by one within age, for they are not reversible but by inspection.

If guardian pleads an ill plea where he might have pleaded a good one, and the infant loses by such ill plea, he shall have writ of *deceit* at his full age, and recover all damages against the guardian; and therefore the Court ought not to accept any for guardian, but who is sufficient to render the infant damages at his full age; and so when guardian vouches ill he shall render damages to the infant. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

Cro. E. 414. pl. 22. Bartholomew and Dighton, Mich. 37 & 8 Eliz. B. R. the S. C. in which the

[3. If an infant brings any action, real or personal, he ought to appear by guardian, and not by attorney. P. 39 El. B. R. 26. between *Barton and Ditton*, adjudged in a writ of error upon a judgment, in an action of false imprisonment, brought by the infant, and the judgment reversed accordingly. P. 1 Ja. B. R. adjudged upon a writ of error in a judgment, in an ejectione firmæ.]

infant recovered, for which reason the Court upon the first motion held, that it being for his benefit, and his appearing by attorney no prejudice to him, held that it should not be assigned for error; but they would advise, and afterwards Pasch. 39 Eliz. being moved, it was held to be clearly error, and judgment reversed for that cause. —S. C. cited by Bridgman, Bridgm. 75. —S. C. cited Cro. J. 441. in pl. 14. —S. C. cited Arg. Palm. 231. —2 Saund. 213. S. C. cited by the Reporter.

Assumpsit against baron and feme, upon a contract by the feme for wares dum solus. It was

[4. In an action brought against baron and feme, the feme being within age, the feme ought to appear by guardian. 26 Aff. 40. So done, 24 E. 1. rotulo clausorum membrana 6. in dorso. The tenant in a writ of *dower* had a guardian assigned by the King, and so signified to the justices, de Banco.]

assigned for error, that the feme was within age, and appeared by attorney, whereas she ought to have been by guardian. Hale Ch. J. and Twisden held it to be error. 2 Lev. 38. Hill. 23 & 24 Car. 2. B. R. *Baddington v. Freeman*. —Vent. 185. *Freeman v. Boddington* S. C. and the judgment was reversed; and Hale said, that the baron could not disavow the guardian made by the Court for his feme. —In debt against baron and feme they appeared by attorney; this is not error, though the feme be under age, because the husband may by law make an attorney, and appear both for himself and wife. Show. 13. Pasch. 1 W. & M. *Humfreys v. Vaughan*.

5. Waste was brought by an infant within age against his guardian,



*lian*, and the *infant was by attorney*, and the defendant shewed this matter, and prayed that the writ be disallowed, & non allocatur; for per Finch. the *defendant may take the age by protestation*, and plead over, for the action lies as well within age, as of full age; and if any thing comes in pleading in prejudice of the infant or of the defendant, then may the Court (well enough for the time) disallow the warranty, and suffer the defendant to take advantage of the age. Br. Attorney, pl. 22. cites 48 E. 3. 10.

Br. Age, pl. 10. cites S. C. — Br. Waste. pl. 49. cites S. C.

6. And per Persy, if the *infant brings action ancestor*, and makes attorney; if the *infant alleges he is within age*, the attorney shall make him come to be viewed by the Court, and if he be within age, the warrant shall be disallowed, and the parol put sine die, notwithstanding that it was received by the Court; quod Finch. concessit. Ibid.

7. Where an infant is permitted to make attorney which is recorded, there is no matter to plead in arrest of judgment by this, but the party is put to writ of error. Br. Coverture, pl. 27. cites 22 H. 6. 31.

Br. Attorney, pl. 46. cites S. C. — Br. Error, pl. 79. cites S. C.

So if the infant levies a fine which is recorded. Br. Coverture, pl. 27. cites S. C.

8. An *idiot* shall not be received to plead by guardian or prochein amy, but ought to be always in proper person in every action brought against him, and he that will plead the best plea for him shall be admitted. Br. Idiot, pl. 1. cites 33 H. 6. 18. by Fortescue J.

S. P. per Cur. 4 Rep. 124. b. but that otherwise it is of a non com-

per; for he shall appear by guardian, if he be within age, and by attorney if he be of full age. — See tit. Lunatick (C. 2).

9. Infant who brought *appeal of murder*, brought it by guardian and not by attorney; quod nota, and it was said there, that it is the common course that it shall be by guardian. Br. Attorney, pl. 1. cites 27 H. 8. 11.

[ 280 ]

10. If a writ of *dower* be brought by an infant, who loses by default at the grand cape, he may reverse the same by a writ of error; but where an infant appeareth by a guardian, and afterwards loses by default, there he shall never avoid it; for if any default be in the guardian, the infant shall recover against him in a writ of *disceit*, and afterwards the judgment in the first Case was reversed. 2 Le. 59. pl. 85. Mich. 32 Eliz. C. B. Anon.

2 Le. 189. pl. 238. Bostwick v. Bostwick, S. C. takes notice, that the judgment was reversed, and that

there commenced a new action.

11. In *replevin* an infant appeared 2 terms by attorney, and the 3d by guardian; and judgment in C. B. was reversed. Mo. 665. pl. 908. Trin. 43 Eliz. B. R. Ewre v. Moyle.

S. C. cited Arg. Palm. 229. — But an infant may

appear by guardian, and when he comes to full age in the same suit he may make attorney, and no error; but not e contra. Mo. 665. pl. 908. cites 48 E. 3. 10. and Trin. 43 Eliz. Rot. 578. B. R.

12. In *trespass*, the defendant being an infant appeared by attorney, and not by his guardian. In error brought of the judgment against him, it was adjudged error and judgment reversed. Cro. J. 9. pl. 12. Pasch. 1 Jac. B. R. Bray v. Grobe.

13. Tenant

Comb. 88.  
Villiers v.  
Fitzgerald.  
S. C. the  
act excep-  
tion was, for  
that con-  
fession [not  
appearance]

was in his own name, viz. quod ipse non potest dedicere &c. and as to the first it was answered, that the entry of the special admission on the plea roll was not necessary, though it is necessary that there should be an admittance, and cited 2 Saund. 94. The Court inclined that it was ill for the 2d exception, but adjournatur.

Cro. J. 580.  
pl. 11.

Trin. 18

Jac. B. R.

STONE V.

MARSH.

S. C. Curia

advifare

vult. —

Bull. 24.

Trin. 8 Jac.

S. C. in

B. R. in

error on a judgment in C. B. and judgment affirmed.

13. *Tenant in dower was an infant, and no warrant was alleged of the admission of any guardian that it might appear to be the act of the Court. After judgment this was assigned for error; and also for that the appearance was by the guardian in his own name; sed adjournatur.* 3 Mod. 236. Trin. 4 Jac. 2. B. R. Fitzgerald v. Villiers.

14. *An infant brings a writ of right by his guardian; pending the suit he comes to full age, and being of full age, he does not make an attorney; the infant has a verdict, and judgment affirmed in error; for it does not appear of record when he came of full age, and it ought to be pleaded before verdict in the first action, and the omission of it is fatal to the tenant, because the writ does not abate, but is abateable only. The statute of 21 Jac. of jeofails helps after verdict where the plaintiff is within age and sues by attorney, but not where he is defendant.* Jenk. 301. pl. 68.

15. *21 Jac. cap. 13. s. 2. Enacts, that after verdict in any Court of record the judgment thereupon shall not be stayed or reversed, by reason that the plaintiff in ejectment, or in any personal action, being an infant, did appear by attorney and the verdict pass for him.*

16. *If an infant be sued he cannot appear or plead by guardian without admittance, and if he do it is a misdemeanor in the attorney, for which the Court may punish him if they please.* Pasch. 21 Car. 1. per Magistrum Livesay & alios clericos. L. P. R. 83.

17. *Where baron and feme sue an action, they sue by attorney, but feme covert cannot make attorney, and therefore the baron makes an attorney for them both; per Cur. obiter.* 2 Saund. 213. Mich. 22 Car. 2.

[ 281 ] 18. *The plaintiff recovered against the defendant in an action for scandalous words, and upon discovering that the defendant was an infant, and that the defendant's attorney knew it, and had appeared for her as attorney, the Court was moved that the attorney should enter the appearance by guardian, and that the defendant's plea upon the roll should be amended; the attorney upon shewing cause deposed, that he did not know of the infancy until the time of trial, but seeing he knew it then the Court granted the motion.* MS. Rep. Mich. 5 Geo. B. R. Stretton v. Burgefs.

(B) In what *Actions and Cases* it ought to be by Guardian.

[1. IF a judgment be *against an infant*, and the infant brings a writ of error to restore the judgment, he ought to assign the error by guardian, and not by attorney. New Entries 289. where the writ of error is adjudged to be discontinued.] S. P. held accordingly by 3 justices, *caeteris absentibus*; and B. R. Carre therefore the plaintiff prosecuted a new writ of error. Cro. J. 250. pl. 2. Mich. 8 Jac. v. Barker.

(C) What *Person* for a *collateral respect* may make an Attorney.

[1. IF an action of debt be brought *against an infant executor*, he cannot appear by attorney, but ought to appear by guardian, else it is error, because otherwise he may be at great prejudice; for assets may be found in his hands, and so judgment shall be given to recover the debt, damages, and costs against him *de bonis testatoris*, si &c. si non, the damages and costs *de bonis propriis*, (as it is done in this case) and perhaps the infant had a release or acquittance to plead, and so he shall be charged *de bonis propriis* by his (\*) ill pleading, without any remedy against the attorney, but if a guardian mispleads, and loses thereby, an action lies against him, and therefore his being executor cannot make him as a man of full age. M. 15 Ja. B. R. between *Westcott and Cottne* adjudged and reversed, per Curiam.] Cro. J. 410. pl. 12. Cotton v. Westcott, S. C. adjournatur; but *ibid.* 441. S. C. judgment reversed. — Poph. 130. S. C. re- \* Fol. 288. solved that it was error. — Roll.

Rep. 380. pl. 40. *Westcott v. Cottle*, S. C. Mallet thought it no error, but Haughton and Doderidge seemed e contra, but no judgment. — S. C. cited per Chamberlaine J. that judgment was reversed. Palm. 245. Mich. 19 Jac. S. C. cited 2 Saund. 217.

[2. If an *infant administrator* brings an action of debt, he may make an attorney, and this shall not be error if the judgment passes against him, for there he is not prejudiced by this, but only he is barred of the debt of the testator. Tr. 38 El. \* *Bede and Starcke*. Rot. 143. But H. 29 El. B. R. adjudged; but quære; for the infant is to be amerced, *pro falso clamore*, and so it is prejudicial to him. Mich. 15 Ja. B. R. between *Westcott and Cottne*, agreed per Curiam. P. 11 Car. B. R. between *Powel and Onslowe*, per Curiam; in a writ of error upon a judgment in villa de Salop, but the judgment was reversed for another cause.] \* Cro. E. 541. pl. 7. Bade v. Starkey, S. C. where it seems that the judgment of which the [ 282 ] error was brought, was given for the in-

fant, and that judgment was affirmed — S. C. cited and says, that it was ruled to be no error, but the judgment was afterwards reversed. Cro. J. 441. pl. 14. in Case of Cotton v. Westcott. — 2 Saund. 217. S. C. cited by Twisden J. that the infant executor recovered, and that his suing by attorney being assigned for error, was over-ruled in B. R. and the judgment affirmed, and yet this was before the 24 [21] Jac. cap. 15. which aids this defect. — Show. 168. Arg. cites Cro. J. 441. and that it is there said that the judgment of Bade was afterwards reversed. — S. C. of Bade v. Starkey cited per Cur. Show. 171. and says, that the reason of that Case was, that there was judgment and no advantage taken of it.

¶ S. P. Mod. 47. in pl. 102. and *ibid.* 298. by Twisden J. — See tit. Amercement (L).

† Poph. 130. S. C. but there the infant executor was defendant, and held error; but per Doderidge J.

If infant executor sues by attorney and recovers, it is not erroneous, because it is for his benefit; so per Cur. the difference is where he is plaintiff and where he is defendant. — Cro. J. 441. 442. pl. 14. S. C. and same difference as to his being plaintiff or defendant, and further as to his being plaintiff where he recovers, and where not; for if judgment be against him, being plaintiff, it there seems to be one with the case where he is defendant.

Infant executor ought to sue by his guardian; per Haughton and Doderidge; and all the clerks informed the Court that this was the usual course. — 3 Bull. 18. — S. P. by Twifden J. that he cannot sue or appear but by guardian or prochein amy. — Vent. 109. Mich. 22 Car. 2. — Mod. 297. Trin. 29 Car. 2. B. R. Twifden J. cited Mich. 1649. Colt v. Sa. a wood, in which he was of counsel where an infant administrator sued and appeared by guardian, and it was objected that it appearing upon the record that it was above 17 it was error, but answered well, and that he ought not to appear by attorney. — Mod. 47. pl. 102. cites S. C.

Cro. E. 377. pl. 28. S. C. and ibid. 376. S. P. in a note at the end of the Case, and because they

[3. If an infant and a man of full age are made executors, they may bring an action as executors, and the infant may sue by attorney, without making any prochein amy, because he sues in the right of the testator, and not in his own right. Tr. 38 El. B. R. the Countess of Rutland's Case adjudged, but there the executors recovered in the action.]

are all but one person, and it is not reasonable that one or two should sue by attorney, and a third by guardian or prochein amy. — Mo. 266. pl. 416. S. C. but S. P. does not appear. — Ow. 156. S. C. but not S. P. — S. C. cited by Chamberlaine J. Palm. 142. as adjudged and affirmed in error. — S. C. cited and agreed by Rainsford J. Mod. 296. and ruled accordingly by 2 justices, contra Twifden J. and judgment accordingly. Trin. 29 Car. 2. B. R. Foxwell v. Tremain — Ibid. 47. pl. 102. and 72. pl. 21. Fox v. the Executors of Pinfort. H. 11. 21 and Mich. 22 Car. 2. but adjourned. — Lev. 299. S. C. adjudged by two, contra Twifden. — Raym. 198. 170. S. C. adjudged accordingly. — Sid. 449. pl. 13. S. C. adjudged accordingly, per Cur. prater Twifden. — 2 Saund. 212. S. C. and judgment of respondeas ouster was awarded with the assent of Twifden, though he was of a contrary opinion. — Vent. 102. S. C. the Ch. J. was absent, being sick, and judgment was by two justices for the plaintiff. — S. C. cited Show. 168.

But where Case was brought against two executors, one whereof was within age, and appeared and pleaded by attorney, Roll. Ch. J. denied the difference as to the appearing in his own or in another's right, and said, that perhaps the executor might be charged de bonis propriis, as in a devastavit, and there is no reason but he should plead by guardian, and he is not within the 21 Jac. for that statute was made for the plaintiff, and judgment reversed nisi &c. Sty. 318. Hill. 1651. Weld v. Rumney. — S. C. cited Arg. Show. 167.

Bridgm. 69. to 79. Holland v. Jackson, S. C. but the writ abated by death of one of the plaintiffs in error. — Roll Rep. 301. to 309. S. C. adjournatur. But the writ abated by the death of one of the plaintiffs. — Palm. 123. Mich. 18 Jac. B. R. seems to be S. C. but S. P. does not appear.

[4. If a common recovery be suffered, and the baron and feme in the right of the feme (the feme being within age) are vouched, and they appear by attorney and vouch over, and so a common recovery is had, this is error; for though the baron be of full age, yet the feme being within age, she ought to have appeared by guardian. H. 13 Ja. B. R. Dubitatur, between Holland and Lee.]

— Cro. E. 739. pl. 12. Holland v. Dauntzey seems to be S. C. but S. P. does not fully appear. — Palm. 224. to 258. Darcy v. Jackson seems to be S. C. and S. P. agreed by all the judges, though they differed in other points, and so no judgment was entered, which otherwise might have been entered, notwithstanding the death of one of the plaintiffs in error, it having been ruled to be entered tunc pro nunc.

[ 283 ] 5. *Præcipe quod reddat against baron and feme, the feme prayed to be received by default of the baron, and said, that the demandant had entered pending the writ; judgment of the writ; the demandant demurred upon it; the feme prayed to be by attorney, and was admitted by attorney; quod nota. Br. Attorney, pl. 45. cites 21 Il. 6. 48.*

6. In *cessavit against a lord of the parliament*, if he will tender the arrears it ought to be in proper person, and not by attorney. Br. Attorney, pl. 48. cites 15 H. 7. 9.

7. In

7. In *debt* the *baron and feme* continue till *exigent*. The baron appeared, but would not suffer his *feme* to appear. It was ruled per Cur. that the *feme* may make attorney to prevent her being *waved*. D. 271. b. pl. 27. Marg.

(D) The Power of the Guardians over the Infant.  
[As to Actions &c. brought by the Infant.]

See tit.  
Guardian,  
(P. 3)(P. 4)

[1.] IN an *appeal* by an *infant* of the death of his father, if the plaintiff hath *guardians* assigned him, and after the *infant* by the mediation of his friends compounds with the defendant for 1500l. and thereupon the *infant* comes into Court, and says he will relinquish the suit against the defendant, and yet notwithstanding the guardians will prosecute the suit, the Court in their discretion may discharge the guardians, and so the suit shall be discontinued; for it is no reason that the *infant* should be bound to continue such a suit against his will, which suit demands but revenge, and will be chargeable to him, and perhaps he will leave the revenge to God. Tr. 43. El. B. R. between *Slanying and Fitts*, adjudged per Curiam; and there the Case of one *Sacheverell and Blackwell* was vouched, which was where an appeal was prosecuted in such a manner by an *infant*, and was discontinued against the will of the guardians.]

A guardian is made by writ out of Chancery, or by direction of the Court, and the *infant* cannot revoke any of them, and if such guardian misbehaves in any action to the prejudice of the *infant*, he shall answer for it; per Dode-

ridge J. Palm. 252. Mich. 19 Jac. B. R. — See tit. Appeal, (C) pl. 6. Toler's Case.

2. *Estrepement* against J. B. of K. the younger, where he had appeared to this before by guardian, where it was founded upon writ of entry at the common law, in which the defendant was named J. B. of K. only, without more, and he would have pleaded in proper person in abatement of the writ that he was of H. and not of K. and also a variance between this action and the first, because the first writ varied as above &c. And there it was agreed, that because the admission by guardian is the act of the Court, that therefore the party in proper person may plead a plea which is contrary to the warranty of the guardian. Contrary where he appears by attorney; for the making of an attorney is his own act, and the admission by guardian is the act of the Court. Note the diversity; but in the Case above he was not suffered to have the plea, because process of outlawry does not lie in this action, and therefore no mischief. Quod nota. Br. Attorney, pl. 4. cites 3 H. 6. 16.

(E) In what Cases an Answer ought to be by [284] Bailiff, and in what by Attorney.

[1.] AT the common law in an *assise* neither the tenant nor disseisor could have answered by attorney, but ought to have answered by bailiff. 21 E. 3. 25. b.]

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Y

[2. By

This is called the statute of  
 [2. By the statute of the 12 E. 2. 1. it is ordained that he who  
 is tenant may make an attorney. 21 E. 3. 25. b.]  
 York, and effects that tenants in assise of novel disseisin may make attorneys, and may also plead by  
 bailiffs, as they used to do.

[3. But the disseisor in an assise is not within the statute, be-  
 cause he is not tenant as the statute speaks, and therefore he  
 ought to answer by bailiff. 21 E. 3. 25. b. adjudged.]

4. Assise against 2, and the one, viz. he who had nothing,  
 pleaded by bailiff to the assise; and so it seems that disseisor may  
 plead by bailiff. Br. Baillie, pl. 17. cites 9 Aff. 11.

5. As in assise against A. and B. which B. made default, and  
 A. as bailiff to him pleaded to the assise, and for himself he pleaded  
 in bar, and took the tenancy upon himself, and so see that the other  
 is a disseisor, and that disseisor may plead by bailiff. Br. Baillie,  
 pl. 18. cites 11 Aff. 23.

6. The tenant in assise may be by bailiff against the plaintiff,  
 but not against the bailiff of a franchise who demands consue-  
 of pleas, where they are at issue that the land does not lie in the  
 franchise. Br. Baillie, pl. 23. cites 28 Aff. 13.

Dr. Con-  
 sance, pl.  
 43. cites  
 S. C.

See tit.  
 Appeal (O).  
 and (A. a)  
 See tit. Ut-  
 lawry (C. b)

Fol. 289.

In a quid  
 juris clamat  
 the defend-  
 ant, upon

a suggestion that she was so old and weak that she could not go to the Bank without the utmost  
 danger, had a dedimus directed to Sanders J. to go to her to make an attorney, and accordingly the  
 appearance by attorney was allowed. D. 135. b. pl. 15. 16. Mich. 3 and 4 P. & M. Turton's  
 Case. The same law of a feme ensuient. Ibid. And says the same was granted in Chancery.  
 Mich. 3 & 4 Eliz. in quid juris clamat brought by FLOWERDEW V. COOTE & Ux. directed to the  
 Chief Justice, and returned served; & Curia advisare vult.

Fitzh. At-  
 torney, pl.  
 80. cites  
 S. C.

If the par-  
 ties are at

issue the tenant may make attorney; per Hill; but by him in ancient time it was used by writ.  
 Br. Attorney, pl. 36. cites 21 E. 3. 48.

And per Belk. in quid juris clamat, when such issue is pleaded, by which the tenant may lose the  
 land; he may make attorney. Br. Attorney, pl. 23. cites 48 E. 3. 24. So after release  
 pleaded, the tenant may make attorney; \* for this peremptory matter countervails an attornment.  
 Br. Attorney, pl. 93. cites 44 E. 3. 34. and H. 21 E. 3. 51. accordingly in per que servitia.

\* [ 289 ]

Note that  
 upon indict-  
 ment of tres-  
 pass in B. R.

the defendant pleaded not guilty, and after made attorney; quod nota bene after the plea pleaded.  
 Br. Attorney, pl. 101. cites 9 E. 4. 4.

[3. In an indictment of trespass the defendant may make an  
 attorney. 22 Aff. 73.]

A man was arraigned upon indictment of extortion, and pleaded not guilty, and made attorney; quod nota. But if it had been felony he could not have been permitted to make attorney. Br. Attorney, pl. 63. cites 22 Aff. 73. — Br. Attorney, pl. 101. cites S. C. and 9 E. 4. 4. S. P. B. was indicted for offering money to J. S. to kill C. The defendant pleaded by attorney, which the Court said he might do ex gratia Curie, but not ex rigore juris. Lev. 146. Mich. 16 Car. 2. B. R. Bacon's Case.

4. In assise against two, the one made default, and the other prayed to be received by his default, because he is his tenant for life, the reversion to him, and the receipt was counterpleaded, and he was received upon the issue to make attorney by writ. Br. Attorney, pl. 61. cites 16 Aff. 17.

Br. Attorney, pl. 30. cites 7 H. 4. 19. — Br. Garantie de Attorney, pl. 8. cites S. C. — Br. Rescript, pl. 34. cites S. C.

5. Appeal of murder, robbery, nor maihem cannot be sued by attorney but in proper person, and likewise judgment and execution shall be in person, and not by attorney; and in this case Husly Ch. J. was against the Case of 40 Aff. 17. supra. Br. Attorney, pl. 78. cites 21 E. 4. 73.

have execution of this judgment, if she does not pray it in person. She was great with child, and a judge went to her to know whether she would have execution; she said, Yes! The appellee was hanged. Jenk 157. pl. 82.

6. In entry the tenant made default after default, and he in reversion prayed to be received &c. and the other counterpleaded, upon which they were at issue, and upon this the tenant by receipt made attorney; quod nota upon the issue, and before trial upon this issue. Br. Attorney, pl. 50. cites 24 E. 3. 51.

counterpleaded the receipt, inasmuch as he had nothing in reversion the day of the writ purchased, which is found for him, and the rest in advisement, inasmuch as the plea ought to have been, that he had nothing in reversion the day of the writ purchased, nor ever after, and so the first prayed to be received by attorney; and per Newton and Paston J. he may make attorney; for if the prayer demur in judgment, he may make attorney; and it was said that if the reversion had been counterpleaded generally, he might make attorney, if issue be taken upon it. Br. Attorney, pl. 40. cites 21 H. 6. 13.

7. In per quæ servitia, after the parties were at issue, the tenant made attorney; quod nota. Br. Attorney, pl. 55. cites 39 E. 3. 26.

peremptory issue joined in this action, the tenant may make attorney; for after the issue passed against him, he shall be disfranchised without other attornment. Br. Attorney, pl. 23. cites 48 E. 3. 24. — S. P. Br. Attorney, pl. 97. cites 7 H. 4. 2.

8. In appeal of robbery, the defendant pleaded not guilty, and was found guilty, and after verdict said that he is clerk, and the plaintiff said that bigamus, which shall be certified by the ordinary, so the plaintiff prayed to make attorney, and it was granted; and so it seems that the plaintiff shall not make attorney in appeal, unless in special case; for here the verdict found for the plaintiff; quod nota. Br. Attorney, pl. 64. cites 40 Aff. 17.

9. In debt, the exigent was not served, and the defendant

Tenant by receipt, after issue joined upon traverse of the receipt, made an attorney.

A woman brings an appeal of the death of her husband, and has judgment. She cannot

In formodon the tenant confessed the action, and he in reversion prayed to be received, and

It was said in per quæ servitia by Wiching, that after

Br. Attorney, pl. 13. S. P. and he was by attorney immediately, cites 40 E. 3. 42.

came out of ward and pleaded, and after plea prayed that he might make attorney, and could not. Br. Attorney, pl. 16. cites 41 E. 3. 29.

[ 286 ] 10. In trespass, *capias* issued, and the defendant came before his day and found mainprise, and had *superfedeas*, and at the day he came and prayed to make attorney, and it was granted. Br. Attorney, pl. 17. cites 42 E. 3. 1.

Br. Aid. pl. 6. cites S. C. 11. The prayees in aid in writ of error came, and joined to the defendant, and made their attorney; quod nota bene. Br. Attorney, pl. 95. cites 42 Aff. 22.

Br. Attorney, pl. 18. cites S. C. 12. In *per quæ servitia* against recluse or close prioress, she shall attorn by attorney, and not in proper person. Br. Attorney, pl. 42. cites 43 E. 3. 8.

Br. Attorney, pl. 92. cites S. C. ——— S. C. cited D. 135. pl. 15. that a *dedimus potestatem* was allowed, because a recluse never can appear in Court.

13. One who came by *superfedeas* upon exigent, would have made attorney after plea pleaded, and could not; otherwise it is after pleading, if he comes by *superfedeas* upon *capias*. Br. Attorney, pl. 24. cites 2 H. 4. 27.

\* This is misprinted (8) in all the editions of Brooke, and should be (18). — Br. Attorney, pl. 26. cites 3 H. 4. 18. S. P. accordingly. [And it is Ffch. 3 H. 4. 18. a. pl. 15.]

Br. Attorney, pl. 28. cites S. C. 15. In *quid juris clamat*, if the defendant pleads in bar, he shall be suffered to make attorney; for the plea which is in bar is peremptory, and countervails attornment. Br. Attorney, pl. 97. cites 7 H. 4. 2.

Br. Attorney, pl. 43. cites 21 H. 6. 42 S. P. — In *detinue* of charters, the defendant came by exigent, and the plaintiff declared of one charter special, by which the defendant made attorney; for if the plaintiff by his writ had demanded one charter special, exigent should not issue, and so upon the declaration of one charter special, he made attorney, and before declaration not. Br. Attorney, pl. 86. cites 30 H. 6. 4. \* concordat 14 H. 6. 16. 16. *Detinue* of a chest of charters inclosed, against one who came by exigent, and the plaintiff declared of a charter special, and to the rest the defendant waged his law, and made it immediately, and to the special charter pleaded that *non detinet*, and prayed to make attorney, the plaintiff said No, for you come by exigent, and per tot. Cur. now he may make attorney; for by the Ley Gager, the cause, for which the exigent issued, is determined; quod nota bene. Br. Attorney, pl. 57. cites 24 H. 6. 1.

A. & M. husband and wife, tenants in

17. Writ of error shall be sued in proper person, and not by attorney. Br. Attorney, pl. 11. cites 34 H. 6. 31.

tail, remainder to the right heirs of A. had issue a daughter; A. died, afterwards M. sold the lands in fee, and E. and her husband joined in a fine to confirm the sale to the purchaser; E. died without issue. Afterwards the fine was engrossed &c. Error was brought by M. and the husband of E. and the cousin and heir of E. and M. and the husband appeared by attorney, and joined gratis with the plaintiff in error, quod nota. D. 89. b. pl. 1. Mich. 1. Mar. Reynolds and Verney v. Dignam & al.

18. Audita



18. *Audita querela* shall be sued in proper person, and not by attorney. Br. Attorney, pl. 11. cites 34 H. 6. 31. In *audita querela*, a venire facias was

awarded out of C. B. against the defendants ad respondendum, and upon the same being served, the parties appeared by attorney. D. 297. pl. 25. a. b. Mich. 12 and 13 Eliz. Puttenham's Case.

19. If *rescous* is returned upon the defendant, *capias* shall issue, and he ought to appear in person, and not by attorney; for this is a contempt, *quod nota*; and yet by Privy Seal he made attorney, *quod nota*; and yet if the Court admits such a man, [ 287 ] or he who comes by exigent or *capias* appears by attorney, this is not error. Br. Attorney, pl. 56. cites 37 H. 6. 27.

20. In B. R. upon *indictment in trespass*, the defendant pleaded *not guilty*, and after he made attorney; *quod nota*. Br. Attorney, pl. 54. cites. 9 E. 4. 4.

21. In *quem redditum reddit*, the defendant would have appeared and pleaded by attorney, and Brian and Catesby would not suffer it, and after they agreed that he should make attorney *ex assensu partium*. Br. Attorney, pl. 68. cites 1 H. 7. 27. Br. Quem redditum reddit, pl. 3. cites S. C.—Jenk. 91. pl. 76. If quem

*redditum reddit* be brought against a sick person, reclus or abbeys, a *dedimus potestatem* lies, and the defendants may make attorney; cites 32 H. 6. 22. S. P. in a *quid juris clamat*. D. 132. b. pl. 15, 16. Mich. 3 & 4 P. & M. Turton's Case.

In *quem redditum reddit*, the defendant was admitted by attorney, per Cur. for it is not like to a *per que servitia*, for there the defendant shall do fealty, and peradventure homage, which cannot be but in proper person, but in this action nothing is to be done but only to attorn, which may be by payment of 1d. by the attorney of the defendant, *quod nota*, per Cur. Br. Attorney, pl. 87. cites 32 H. 6. 22.

22. In *account* the defendant may appear by attorney, and yet he shall account in person; and in *debt* he may wage his law by attorney, and yet he shall make the law in person; per Towns. Br. Attorney, pl. 68. cites 1 H. 7. 27.

23. And in *quid juris clamat*, if the defendant claims fee, he may make attorney; per Brian & Catesby. Br. Attorney, pl. 68. cites 1 H. 7. 27. S. C. cited Le. 290. in pl. 397.

24. *Error* cannot be assigned by attorney, but in person. Br. Attorney, pl. 107. cites 5 H. 7. 3.

25. A man may make attorney in *appeal of maihem*. *Quod* vide of common course, anno 16 H. 7. in Caworth's Case. Br. Attorney, pl. 58. cites 21 H. 7. 39. 2 Inst. 313. cites S. C. of 21 H. 7. & Caworth's Case, which

Cafe Ld. Coke says is uncertainly reported; for it appears not whether it be meant of the plaintiff or defendant; but of the defendant it cannot be intended, for that should be against our books, the true interpreters of this act. And of the plaintiff (it seemeth it was intended) he cannot be by attorney, and that was Caworth's Case, mentioned in the report of 21 H. 7. the record whereof being found out, is against the report thereof; which very point came in question in my time in B. R. in an appeal of mayhem brought by HUDSON v. MARWOOD, Mich. 25 and 26 Eliz. B. R. The plaintiff appeared by attorney, and declared against the defendant. The defendant prayed that the plaintiff might be demanded, for that he could not appear by attorney; and if the plaintiff appeared not, that he might be nonsuited; against which the counsel of the plaintiff objected, that the plaintiff in an appeal of maim might appear by attorney; for that it might be that he was so wounded that he could not appear, and for authority cited the same book in 21 H. 7. Whereunto answer was made by the counsel of the defendant, and resolved by the whole Court, that the plaintiff could not appear by attorney; for the defendant may demand oyer of the mayhem &c. which shall be peremptory to him, being a trial of the mayhem, which is a trial the law gives him. And albeit it may be hard

and difficult in some particular case, in respect of the grievousness of the mayhem, for the plaintiff ~~as~~ appear in person, as it was in 16 H. 5. where the mayhem was heinous and horrible; the legs of ~~the~~ plaintiff being broken over a threshold, yet that must not change the law, nor take from the defendant his just defence and trial; for so upon the like surmise the defendant may be barred thereof in all cases. And Wray Ch. J. said that the record of Caworth's Case had been seen, and that the record thereof was against the report, and thereupon the plaintiff was called, and by the rule of the Court was nonsuited, and I was of counsel in this case, which I have the rather reported more at large, for that no man should be deceived by the said report of 21 H. 7.

\* S. P. Br. 26. In these cases a man shall not make attorney, unless in  
Attorney, special case, viz. in \* *attaint*, † *premunire*, ‡ *appeal*, *per quæ*  
pl. 106. cites *servitia*, *quid juris clamat*, *quem redditum reddit*, nor in *assignment*  
2 H. 7. 7. *of error*, nor at the *pluries* in case of contempt, nor the tenant in \*\*  
+ S. P. Br. *cessavit upon tender of arrears*, nor the *præes* to be received in *præ-*  
Attorney, *cipe quod reddat*, in default of tenant for term of life who makes  
pl. 104. cites default. Br. Attorney, pl. 82.  
39 E. 2. 7.

† S. P. Br. Attorney, pl. 91. cites 13 E. 3. Fitzh. Attorney, pl. 73. \*\* S. P. Ibid. pl. 94. cites 50 E. 3. 23.  
[ 288 ]

At common law where the writ commanded the defendant to appear, it was always taken that he should appear in person, and

27. By the policy of the common law, that suits might not increase and multiply, both plaintiff and defendant, demandant and tenant, in all actions, real, personal, and mixt did appear in person, as well in courts of record as not of record, because the writs do command the tenant or defendant to appear, which was always taken in proper person; and the entry in every action for the demandant or plaintiff is, *et prædictus petens*, or *querens obtulit se* 4to die, which was understood in proper person. 2 Inst. 249.

could not appear by attorney; but after appearance the Courts of Chancery, B. R. and C. B. and all other judges that held plea by writs, might admit him by attorney. Contrary where the plea was held without writ, unless the King's writ de *attornato faciendo* was granted. 8 Rep. 58. b. in Beecher's Case.

He ought to follow his suit in his own proper person at common law, and not by attorney, without the King's special warrant by writ or letters patent. Co. Litt. 128. a. — 2 Inst. 377. 378. S. P. and that no attorney could be made in any action till Edw. 1. de *gratia speciali*, by the stat. Westm. 2. cap. 10. gave power to his subjects to make them in cases therein expressed, and commanded his judges to admit them. — 2 Mod. 83. Arg. S. P.

28. One that had incurred a *præmunire* was allowed to plead his pardon without appearing in person. Roll 190. pl. 28. Pasch. 13 Jac. B. R. The King v. Mildmay.

29. Administrator of one outlawed for murder brought error to reverse the outlawry, and prayed to appear by attorney. Brampton Ch. J. and Mallet only in Court, agreed that he might; for the reason why the party himself must appear in proper person is, that he may stand rectus in Curia, and that he may answer to the matter in fact, which reason fails here, and therefore administrator may appear by attorney. Mar. 113. pl. 190. Mich. 17 Car. Anon.

30. It was moved that certain persons, bound in a recognizance to appear in B. R. for a riot, might appear by attorney, and not in person, being poor people; but the motion was denied; for it is the constant practice to appear in person. 11 Mod. 253. pl. 5. Mich. 8 Ann. B. R. Anon.

(G) In what Cafes. [*And upon what Return.*]

[1. UPON a *capias* in procefs upon a *statute merchant*, if the sheriff returns *quod non est inventus*, the party cannot answer by attorney. 26 E. 3. 76.]

In *trespass* the sheriff returned *non est inventus*, yet the de-

fendant was received to appear by attorney at the same day; but it was said, that after exigent awarded the defendant shall not be received to appear at the first by attorney, but in proper person; but at the *capias* he may appear in person or by attorney. Nota. Br. Default, pl. 16. cites 3 H. 4. 2.—Br. Default, pl. 17. cites S. C. in the written book.—Br. Attorney, pl. 98. cites S. C.

[2. [*But*] In *trespass* or *account*, if the sheriff returns *quod non est inventus*, the party may appear by attorney. 26 E. 3. 76.]

3. A man who came by *reddidit se* upon an exigent, was suffered to make an attorney; for *pluries capias* issued where *alias capias* ought to have issued, and so it shall be as if he had appeared *gratis* at the *capias*. Br. Attorney, pl. 95. cites 3 H. 4. 4. 5.

4. In *trespass* at the *capias* the defendant delivered to the sheriff a *superfedeas*, and yet he returned him *cepi corpus*; and for this the defendant prayed to be by attorney; and per Hank. so he shall; for if the sheriff upon exigent returns the party outlawed where he has *superfedeas*, there the *superfedeas* shall serve him to reverse the outlawry, though he did not deliver it to the sheriff, because it is of record. Br. Attorney, pl. 25. cites 3 H. 4. 5.

In *trespass* if *capias* is sued, and the defendant appears upon the return of *cepi corpus*, he shall

5. And in the same term a man was returned outlawed, and he came and shewed that *capias* was omitted, and prayed that the process be annulled, and he to be admitted by attorney, and so it was; and the reason is, that if he had come at the first *capias* it had been by attorney, and now he is in the same plight as if he had come at the first *capias*. Quod nota, Ibid.

[ 289 ] not make attorney; for there he shall be every day by main-prize. Br. Attorney,

pl. 17. cites 42 E. 3. 1.—In *trespass* exigent issued, and the defendant came and took *superfedeas*, and came at the day of return, and the plaintiff declared, and the defendant made defence, and prayed to make attorney; but Martin J. said he could not; for the exigent was awarded. *Contra* where *capias* is awarded, and the defendant takes *superfedeas*, and after he may make attorney. Br. Attorney, pl. 52. cites 4 H. 6. 23.

6. In *detinue* it appears that he who comes by *capias* returned *cepi corpus* shall not make attorney. Br. Attorney, pl. 27. cites 7 H. 4. 2.

But if the plaintiff counts of a box of charters, now it

appears that *capias* ought not to have issued, because it touches realty, and therefore now he shall make attorney. Br. Attorney, pl. 27. cites 7 H. 4. 2.

7. A man cannot appear by attorney, unless he has day in court by process, quod nota; per Cur. Br. Attorney, pl. 59. cites 1 H. 6. 4.

S. P. For a stranger to the replevin upon whom avowry is

made, nor the prayee in aid, nor the voucher cannot appear by attorney, when the aid is prayed, or when he is vouched; but upon process awarded they may appear by attorney; quod nota per Cur. but these may appear in proper person at the first day; quod nota. Br. Default, pl. 54. cites S. C.

8. He who comes upon exigent shall not make attorney where the exigent lies well; but contra upon exigent in delinque of charters; for such procefs does not lie in this action. Br. Attorney, pl. 100. cites 8 H. 6. 29.

9. If the demandant in court baron makes attorney by writ of the Chancery, it is not good, because the King does not intermeddle to make attorney, unless in his own Court, or in his county; quod nota. And it was said that the parties may make attorney in any suit, unless in case where the defendant shall be imprisoned; and he shall not make attorney in assise, nor in attachment, nor contra finem levatum in Curia Regis, nor in appeals; but by some, general attornies made in Chancery shall be admitted in every court whatsoever. Quære. Br. Attorney, pl. 84. cites the Register, fol. 9.

10. Capias issued to take the defendant in debt, and he sued superseadeas. The sheriff returned the capias quod cepit corpus & eum liberavit &c. and the defendant came and pleaded, and prayed to be by attorney, and so he was; for it shall be intended that the superseadeas was purchased before his arrest. Br. Attorney, pl. 85. cites 11 H. 6. 32.

11. In trespass, a man was taken by capias, and after superseadeas came to the sheriff, and he returned cepi corpus quem habeo ad diem paratum &c. and that after writ of superseadeas was delivered to me, and prayed that he may make attorney, and was not suffered, quod nota, inasmuch as he came by return of cepi corpus, and it was his folly that he had not delivered the superseadeas before that he was taken; for after that he is taken, the sheriff cannot let him go. Br. Attorney, pl. 38. cites 19 H. 6. 43.

12. In debt if capias issues, and the defendant has superseadeas, there if he renders himself to the sheriff before the taking, he shall be received, at the day in Bank upon all this matter returned, to make attorney, and shall not be committed to the Fleet, nor pay any fees, and the return was quod tali die cepi corpus &c. and that such a day after he delivered to him a superseadeas, and that such a day before the taking he rendered himself &c. And so note that if he had been taken before he had rendered himself or shewed the superseadeas, there he should be committed to the Fleet, and pay fees. Br. Attorney, pl. 41. cites 21 H. 6. 20.

[ 290 ] 13. In trespass, if the defendant at the capias renders himself to the sheriff who imprisons him, and he purchases superseadeas, and by this the sheriff permits him to go free, and returns the capias and superseadeas, the defendant shall make attorney upon his appearance, and shall not be committed to the Fleet. Contra where the sheriff takes him before any render, and after superseadeas comes, and all this is returned, he shall not make attorney; and if the sheriff returns no render, but superseadeas as above, there it shall be intended that he rendered himself, and after purchased superseadeas, and so there he shall make attorney. Br. Attorney, pl. 47. cites 22 H. 6. 46.

14. In

14. In debt and the like, if the defendant is *returned cepi corpus* upon *capias*, and the plaintiff is demanded, and does not come, and the judges will not record the nonsuit, because it being the first day of the term the defendant shall be admitted by attorney. Br. Attorney, pl. 8. cites 33 H. 6. 28.

In debt the defendant came by *cepi corpus*, and prayed that the plaintiff might be demanded, to

the intent to have him nonsuited; and per Cur. if he does not come *sedente curia*, a nonsuit shall be recorded, and the plaintiff *did not appear*, by which the defendant was received to make attorney immediately. Br. Attorney, pl. 80. cites 22 E. 4. 1.

15. And where the sheriffs return that before the arrival of the writ of *capias* the defendant was committed to them by the council of the King, for matters touching the King, and that *corpus paratum habent*, it shall be by attorney; for he was not taken by this *capias*, but upon another cause. Quod nota. Ibid.

16. Where judgment is that the defendant shall make fine, he shall not plead pardon or release by any attorney, but in proper person; for he shall be imprisoned, and then he is present in person. Br. Attorney, pl. 11. cites 34 H. 6. 31.

Br. Charten de Pardon, pl. 4. cites S. C. — Br. Garratt de Attorney;

pl. 3. cites S. C. — But where he shall only be amerced, he shall plead pardon by a new attorney by a new warrant. Br. Attorney, pl. 11. cites 34 H. 6. 31.

17. In error, if the defendant be not in ward, he may appear by attorney; but if he be in ward he shall find surety, and shall make recognizance. Br. Attorney, pl. 73. cites 5 E. 4. 6.

18. In appeal the defendant was acquitted, and the plaintiff found insufficient to render damages, and that two were abettors, and they pleaded that they did not abet, and the defendant prayed that he might make attorney against the abettors, and so he did. Br. Attorney, pl. 74. cites 8 E. 4. 3.

19. He who comes by *cepi corpus* upon *capias* in action of the party, may appear always by attorney by assent of the parties, and well, though the assent be not of record; for it shall be so intended when record is by attorney. Br. Attorney, pl. 79. cites 21 E. 4. 77.

20. In every case where the party is to excuse himself of a contempt, he ought to come in proper person; quod nota, by all the justices. Br. Attorney, pl. 81. cites 22 E. 4. 34.

As error of an ill judgment in Coventry, directed to

the mayor, returnable in B. R. such a day, and no writ returned, by which issued, alias, and then pluries, at which day the mayor returned the writ by attorney; and by all the justices at the pluries, he shall return in person, and not by attorney. Br. Attorney, pl. 81. cites 22 E. 4. 34.

So at the pluries in *replevin*, or upon *corody* written. Ibid.

21. If a man outlawed in appeal brings *scire facias* upon charter of pardon, which is returned served, in such *scire facias* the appellant shall not make attorney, as he might upon issue of bigamis. Br. Scire Facias, pl. 236. cites 2 R. 3. 8.

Br. Attorney, pl. 88. cites S. C.

22. In trespass, if the defendant comes by *cepi corpus*, and the plaintiff is not in Court in proper person, nor by attorney, having warrant of attorney, there the defendant shall go by attorney without mainprise. Quod nota. Br. Attorney, pl. 89. cites 2 R. 3. 15.

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23. *In proteſts upon contempt*, as alias and pluries, and then attachment, the defendant ought to appear in proper perſon at the day of the return. Br. Attorney, pl. 69: cites 3 H. 7. 6.

Br. Attorney, pl. 2. cites S. C.

24. A man was outlawed and miſnamed, ſcilicet, *T. Walter* for *T. Falter*, and taken by *capias utlagatum*, and was not ſuffered to be by attorney, till it was tried by *ſcire facias* againſt the plaintiff, but was by mainpriſe body for body; for it was only ſurmife till it was tried. Br. Garrantie de Attorney, pl. 40. cites 7 H. 8. 11.

Cro. J. 211. pl. 3. Beecher v. Sherley S. C. P. by Fleming and Coke. —

3 Rep. 58. a. b. Mich.

6. Jac. S. C. reſolved. — Roll. Rep. 396. Coke Ch. J. ſaid, it had been ruled by all the Juſtices in the Exchequer, that a *retraxit* cannot be entered by attorney, but it muſt be by the party in perſon, becauſe it will bar him.

26. By the ſtat. 4 & 5 W. & M. cap. 18. any perſon outlawed for any cauſe, except treaſon and felony, may appear by attorney and reverse the ſame. See tit. Utlawry.

27. In an attachment of privilege by the marſhall, he ſhall have no attorney, he being preſent in Court. 6 Mod. 16. Mich. 2 Annæ B. R. Anon.

## (G. 2) Warrant of Attorney, neceſſary in what Caſes.

Br. Garrantie de Attorney, pl. 22. cites S. C. and

that al- though he be tenant, and will plead in bar, he needs no warrant. *Guardian ſhall ſhew warrant*, but *prochien amy not*, quod nota; and yet it ſeems that the guardian ſhall be admitted by the Court, and the prochien amy not. But by 19 Aff. 10. the guardian ſhall not have warrant as attorney ſhall have, becauſe he is admitted by the Court, and this is the beſt law. Br. Garrantie de Attorney, pl. 47. cites 34 Aff. 5.

1. **GUARDIAN** who is admitted for an infant needs no warranty, becauſe he is admitted by the Court. Br. Attorney, pl. 62. cites 19 Aff. 10.

2. A corporation aggregate cannot appear in perſon, but by attorney. 10 Rep. 32. b. in the Caſe of Sutton's Hoſpital.

6. Mod. 16 Mich. 2 Annæ B. R. Anon. S. P. and ſeem to be S. C.

3. An attorney appeared without any warrant, and judgment was had againſt the client; the queſtion was, if the Court could ſet aſide the judgment; and per Cur. the judgment ſhall ſtand, if the attorney is reſponſible, becauſe it is regular, and there is no default in the plaintiff; but if the attorney is not reſponſible, or ſuſpicious, it ſhall be ſet aſide, for otherwiſe the defendant has no remedy, and any one may be undone by that means. 1 Salk. 88. pl. 7. Trin. 2 Ann. B. R. Anon.

(H) What shall be made a good Warrant of Attorney.

[1. A. Executor of C. brings debt against B. and the record is, Cro. J. 115. that B. *po. lo. suo J. versus A. in placito debiti*, and does pl. 9. S. C. held that it not name A. executor in the warrant, this is no good warrant. M. was well 4 Ja. between Hilliard and Redman, dubitatur.] amendable, and it should be intended to be in this action, because there is no other pending; and so it was ordered to be amended, and judgment affirmed. — Jenk. 316, pl. 5. S. C.

[2. In an action of waste, *querens obtulit se qto die per attornatum suum*, and does not shew his name, but after in the assignment of waste the name of the attorney is expressed, and after judgment [is given] for the plaintiff, yet this is erroneous. D. 1. Ma. 93. b. 25. adjudged.] This was the Case of Terrel v. Terrel.

[3. If a man appears *per . . . . Higgins, attornatum suum*, without putting his christian name, this is not good, but as if he had no attorney named. M. 31, 32 El. B. R. between \* Mallet and Tempest adjudged, M. 10 Ja. B. R. adjudged, H. 13 Ja. B. R. Sir William Howson's Case, per Coke, and Tr. 14 Ja. B. R. the same Case.] \* Cro. E. 153. pl. 32. Hill. Rainford and Tempest v. Mallet, S. C. held accordingly. — Le. 175. pl. 3.

246. Tempest v. Mallet S. C. — S. C. cited by Coke Ch. J. 3 Bult. 202. + 3 Bult. 202. Howson v. Fountain, S. C. held accordingly by Coke and Dodderidge, but if it had been once right with his christian name, and afterwards the same omitted, then it might be amended, there being then a good warrant in the record for doing it. — Roll Rep. 281. pl. 1. S. C. held not good. — The reason, wherefore the certain name of the attorney must be put in, is, because if one appears as my attorney without my authority I may have my action of the case against him; by Clenche J. Godb. 74. pl. 89.

[4. In an action of waste, if the plaintiff *obtulit se* against the defendant, *per attornatum suum*, and after declares *per attornatum suum*, and the defendant does never appear, but a *distringas* issues according to the statute, and judgment by default is had against him, without naming the attorney, yet this is no error, because it is not the use of the philizers in Banco to enter the name of the attorney before the appearance of the defendant. Mich. 10 Car. B. R. between Atkins and Higgs per Curiam, adjudged upon a certificate of the philizers in Banco, and the judgment given in Banco affirmed accordingly. Intratur. Hill. 8 Car. Rot. 821.]

[5. In a common recovery suffered in a writ of entry brought against Eliz. P. the warrant of attorney for the defendant is Alicia Pind. *po. lo. suo A. B. &c. against N. putting Alicia for Elizabeth*; this is not good, for here is no warrant of attorney entered for Elizabeth. D. 1, 2. Mar. 105. 16. but there quære whether it shall be amended.] D. 105. a. b. Mich. 1 & 2 P. & M. Pinder v. Norton.

6. The writ was brought against the abbesse de Fount Ebroul, who appeared by her attorney general by the warrant of the Chancery de Fount Ebroul, and yet held good in as much as it was general, notwithstanding that the warrant was purchased after the writ purchased; for it may be that other writs of older date were pending against

against her by such name. Thel. Dig. 87. lib. 9. cap. 8. f. 1. cites Pasch. 8 E. 388.

7. But in account by *H. de Bert.* he counted by attorney, and his warrant was for *H. Bert.* without *de*, by which the defendant went fine die. Thel. Dig. 87. lib. 9. cap. 8. f. 2. cites Mich. 12 E. 3. Variance 79.

8. In *attaint* one was received and made such warrant of attorney, *R. W. qui admissus est ad defensionem juris sui defend. &c. viz. de quo posuit loco suo F. T. versus &c. de placito juratae 24 militum ad convincend. 12 de placito terræ; quod nota bene.* Br. Garrantie de Attorney, pl. 21. cites 14 Aff. 2.

9. In *scire facias* for a prior, in the writ he was named successor, but in the warrant of attorney not, and yet held good. Thel. Dig. 87. lib. 9. cap. 8. f. 3. cites Trin. 16 E. 3. Variance 60.

10. In *præcipe* quod reddat the demandant appeared by attorney, and because there was a variance between the writ and the warrant of attorney, a nonsuit was awarded. Br. Attorney, pl. 20. cites 45 E. 3. 24.

Br. Garran  
de Attorney,  
pl. 44. cites  
S. C.—  
Thel. Dig.  
87. lib. 9.  
cap. 8. f. 4. cites S. C.

11. If *feme covert* prays to be restored by special writ of the Chancery by attorney, there the warrant of attorney of the Chancery ought not to vary from the record, but it is not to the purpose. Br. Variance, pl. 106. cites 7 H. 4. 2.

12. In *præcipe* quod reddat at the nisi prius attorney appeared for the vouchee, and prayed the judge to record it, who said, that he had not spoke with his master; and said, that if the brother of his master would record it, he should be attorney, and thereupon the inquest was taken, and passed for the demandant, and after came the brother, and recorded that the vouchee would have the attorney for his attorney, and at the day in Bank the demandant prayed judgment, and the other said that he shall have only petit cape, for the default of an attorney is a default, and yet the demandant recovered, per judicium; for it seems, that those conditional words never came in the record; for it was adjudged, that in as much as it appears of record that he made attorney, therefore judgment as above &c. Br. Attorney, pl. 29. cites 7 H. 4. 4.

Br. Garran  
de Attorney,  
pl. 7. cites  
S. C. and  
says the  
demandant  
recovered,  
and the ten-  
nant over in  
value, and  
8 H. 4. 3.  
similiter.

13. Three things are requisite to the making of an attorney, 1st, The agreement of the attorney to be attorney for the party. 2dly, The agreement of the party to have him for his attorney. 3dly, That the justices will record it; and the one without the others is not sufficient. Per Brian. Mich. 7 H. 4. 4. a. pl. 22.

14. Debt by *Alice Baff.* the defendant demanded judgment of the writ, for she, before the writ purchased, married *J. Baff.* who died, and she married *J. Coff.* before the writ purchased, and after *J. Coff.* died, and therefore she ought to be named *Alice Coff.* and not *Alice Baff.* and special warrant was recorded by *Choke J.* for the defendant for attorney, that the defendant posuit loco suo *A. F.* against *Alice Coff.* who has brought writ of debt against the defendant by name of *Alice Baff.* and so a special warrant, and therefore would



would have pleaded the misnomer of the plaintiff by attorney, and because it was a strange warrant, and contrary to the common course, 4 justices said that they would be advised; but it is said there in the margin, that *such warrant may be suffered for a feme pregnant, or a corporation, who cannot appear in person*; but contra here where no such mischief is shewn. Br. Garran de Attorney, pl. 27. cites 5 E. 4. 108.

15. Warrant of attorney by mayor and commonalty *shall be general according to his writ*, and because it is that the mayor and citizens posuit loco suo, he shall not plead misnomer; per Brian Ch. J. and therefore he *shall have* in such case *special warrant of attorney by their very names of incorporation, and then the attorney shall plead misnomer*; quod fuit concessum, per tot. Cur. Br. Garran de Attorney, pl. 36. cites 21 E. 4. 13.

16. The warrant of attorney of the vouchee *shall be such*, that A. B. the vouchee posuit loco suo *J. B. versus petentem in placito terræ*, per the prothonotary; and by the justices this warrant shall serve him against the tenant, if the vouchee counterpleads the lien with the tenant. Br. Garran de Attorney, pl. 25. cites 3 H. 7. 13.

17. In a bill of intrusion it was assigned for error, that the record is entered *inter J. C. præsentem hic in Curia by J. S. attornatum suum*, and that cannot be, for it is oppositum in objecto, that one can be present in Court, and also by attorney, simul & semel; for the attorney is to supply the default of the personal presence; to which it was said by Wray, Anderson, and Periam, that the matter assigned was no error; for there are many precedents in the Exchequer of such entries, which were openly shewed in Court, as 48 E. 3. 10 R. 2. 20 H. 7. 20 H. 8. and by Manwood Ch. B. it is not so absurd an entry as it has been objected, for *if one has an attorney of record in B. R. and he himself is in the Marshalsea*, and there is an action against him, *he is present as prisoner, and also by attorney*; and by them, notwithstanding that here appears a contrariety, for such entry properly is (*præsentem hic in Curia in propria persona sua*) yet because *many precedents* are accordingly, it is the more safe course to follow them, for if this judgment be reversed for this cause, many records should also be reversed, which would be perilous. Le. 9. pl. 12. Mich. 25 & 26 Eliz. Cater's Case.

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18. Error to reverse a common recovery in writ of right patent in the city of Worcester, for that such a one *pon. loco suo W. H.* and did not write the name at length, but it was at length in the plea roll; it was insisted, that *all the records of the city are of the same form*. Shute and Clench J. held it not good, for they ought to follow the course of the common law; and the reason why his name ought to be put is, because if he appear as my attorney without my authority, I may have an action on the case against him, which I cannot have against W. H. Adjournatur. Godb. 73. pl. 90. Mich. 28 & 29 Eliz. B. R. Bilford v. Doddington.

19. Error was, that the entry of the warrant of attorney of the

the defendant was *ponit loco*, but *says not (suo)* but the entry being that the plaintiff *ponit loco suo*, and that the defendant *ponit loco similiter*, it is good enough, and the judgment was affirmed. Cro. E. 201. pl. 29. Mich. 32 & 33 Eliz. B. R. Yeoman v. Stenlack.

20. A letter of attorney for one to appear to an action is good enough by *parol* to support a judgment given thereupon; per Pinfent prothonotary of C. B. Nota. Sty. 348. Mich. 1652. Prior v. Hale.

## (H. 2) Warrant of Attorney to confess Judgment; good.

1. IF warrant of attorney be given after the continuance-day to enter up a judgment as of the term preceding, this may be well enough, if it be dated within the term; but it cannot be so if such a warrant be given to confess a judgment generally, and dated after the term. Vent. 113. Pasch. 23 Car. 2. B. R. Anon.

2. By the practice a warrant of attorney before the assign-day to enter up judgment as of the preceding term, is good; per Holt Ch. J. Cumb. 212. Trin. 5 W. & M. in B. R. Anon.

3. If one under arrest gives a warrant of attorney to confess a judgment to the plaintiff, no attorney being by, we generally vacate it; but if the judgment were to another person, as to his bail &c. it seems to be out of the rule; per Holt Ch. J. Cumb. 224. Mich. 5 W. & M. in B. R. Anon.

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## (I) At what Time a Warrant of Attorney may be entered.

Br. Attorney, pl. 24. cites S. C. Warrant of attorney may be entered at any time before judgment,

[1. THE warrant of attorney may be entered at any time before judgment. 41 E. 3. 1. b.]

[2. So a warrant of attorney may be entered at any time after judgment, before any writ of error brought. D. 2 Eliz. 180. 48. admitted and adjudged. D. 5 Eliz. 225. 34. admitted and adjudged.]

and even after writ of error brought, if there be laches in the party in prosecuting his writ of error; per Doderidge J. clearly. 2 Roll Rep. 186. Trin. 18 Jac. B. R. — Mar. 122. pl. 201. S. P. per Cur. Mich. 17 Car. — So after error assigned in B. R. the warrant of attorney was received and entered upon record by order of the Court of C. B. Brownl. 46. Pasch. 12 Jac. Sheriff v. Whitfander; and says the like was Pasch. 2 Jac. Rot. 1956. between BAC THORNES AND SMITH; and the like Mich. 1 Jac. Rot. 1306. between Smith and Kent.

In debt error was assigned that no warrant of attorney was entered

[3. So after judgment and a writ of error brought returnable in Michaelmas term, and nothing done thereupon, not prosecuted, and therefore in Easter-term after a warrant of attorney may be entered, by reason of the laches aforesaid. D. 2 Eliz. 180. 48.]

in such a term. Per Williams J. this is a clear error; and rule was made quod iudicium revesetur; but this not being entered of record, a certiorari was granted to inform the Court whether any warrant of attorney was entered, and when, because it might be entered in another term, and good, and it was the neglect of the plaintiff himself in the writ of error that the judgment for reversal was not entered. 1 Bullst. 21. Pasch. 8 Jac. in B. R. Smith v. Skipwith. — Cro. J. 277. pl. 7. Pasch. 9 Jas. B. R. the S. C. and it was held by all the Court that it is not material in what term it is entered, so it is entered at all, and therefore it was ordered that the reversal of the judgment be stayed.

[4. So after judgment in Banco, if the defendant against whom the judgment is given, brings a writ of error returnable the first day of Trinity-term; but the writ is not delivered to the clerk of the Treasury till 6 days after the day of the return; in this case the defendant in the writ of error may put in a warrant of attorney for the plaintiff in the writ of error by leave of the Court, and this shall be entered accordingly. D. 5 Eliz. 225. 34.]

[5. If a man recovers by judgment against J. S. who brings a writ of error the same term the judgment was given, though the same term the record is in the breast of the judges, yet the plaintiff shall not be received after to put in a warrant of attorney for himself. D. 6. 7 Eliz. 236. 58. adjudged.]

[6. In a common recovery, if the original be returnable octabis Michaelis, which is the 9 October, and the dedimus potestatem for the defendant, de attorney faciendo, bears date 11 October, and the mittimus thereof in Banco bears date the 30th of October, which is after the relation of the judgment, which is octabis Michaelis, and so the warrant was dated after the judgment given, contrary to the supposal of the writ of dedimus potestatem, which is cum breve nostrum pendeat coram &c. and this does not depend after judgment. D. 5 Eliz. 220. 13. per Curiam, Error.]

7. The attorney of the plaintiff who had judgment to recover in debt was commanded to the Fleet, because he had not put in warrant of attorney before verdict, and after was released, because a bill of it was found in the Court, which was not inrolled, and the plaintiff recovered. Br. Attorney, pl. 14. cites 41 E. 3. 1.

Br. Garrant of Attorney, pl. 4. cites S. C. —  
Br. Amendment, pl. 96. (95) cites S. C. that

it was left in the remembrance, and neglected to be entered. — Fitzh. Judgment, pl. 86. cites S. C.

8. Per Hulse. it is only a new use to reverse a judgment for [ 296 ] not entering of the warrant of attorney; for if a man has warrant of attorney by patent which is of record, and brings it in his pocket, process shall not be reversed by this, though it be not entered. Br. Garrant de Attorney, pl. 9. cites 8 H. 4. 3.

9. 18 H. 6. cap. 9. Every attorney who hath not his warrant entered upon record, in all suits wherein process of capias and exigent are awarded, the same term in which the exigent is awarded or before, and is therefore attainted by like examination, for every time he so offends he shall forfeit 40s.

10. If warrant of attorney be put in at the distringas juratores, and was not put at the term of the issues joined, yet it suffices if a justice records it. Br. Garrant de Attorney, pl. 29. cites 4 E. 4. 13. per Choke J.

11. And

11. *And warrant of attorney shall be put in in the term in which the exigent issued upon certain pain.* Ibid.

12. 32 H. 8. cap. 30. s. 2. Enacts, that every attorney for any demandant or plaintiff, tenant or defendant in any actions in the King's said Courts, shall deliver his warrant of attorney to be entered of record in the same term when the issue is entered of record, or before, upon pain of forfeiting to the King 10l. and further, to suffer such imprisonment as by the Court shall be thought convenient.

13. 18 Eliz. cap. 14. s. 1. Enacts, that after verdict judgment shall not be stayed for want of any warrant of attorney.

14. 18 Eliz. cap. 14. s. 3. Enacts, that all attornies in any court of record shall deliver in the warrant of attorney to be entered or filed as heretofore, upon pain to forfeit 10l. the one moiety to the Queen, and the other moiety to such officer to whom the warrant should be delivered, and to suffer imprisonment by the discretion of the Court.

After a writ of error granted, a warrant of attorney

cannot be filed, if the party be alive that made the warrant; but otherwise if he be dead. Mar. 93. pl. 160. Hill. 16 Car. C. B. — It was said to be a rule in B. R. that though an attorney be dead, yet the warrant of attorney might be filed, which was not denied by the Court here. Mar. 103. pl. 177. Trin. 17 Car. Anon. — Where the record by the laches of the plaintiff in the writ of error is not certified in due time, there the warrant of attorney shall be filed; per Cur. Mar. 122. in pl. 201. Mich. 17 Car.

15. After a writ of error brought, and error assigned, it was moved to file a warrant of attorney, and granted. Brownl. 46. Trin. 11 Jac. Olive v. Hammer.

16. A warrant of attorney may be entered after the record removed; per Cur. obiter. Het. 59. Mich. 3 Car. G. B. in Wolfe's Case.

17. In error upon a recovery in C. B. it was assigned, that there was no warrant of attorney, whereupon a warrant of attorney upon award of the exigent was certified; the Court held that this warrant is sufficient, and all the prothonotaries of C. B. certified accordingly, and so judgment was affirmed. Jo. 201. pl. 1. Hill. 4 Car. B. R. Sir Robert Howard's Case.

18. If a warrant of attorney be to enter up a judgment as of this term or any other time after, the attorney may enter judgment at any time during his life, but otherwise if the words (at any time after) are wanting. Mod. 1. Mich. 21 Car. 2. B. R. Mynn's Case.

It is determinable by the party's death; but if the party

dies in the vacation, the attorney may enter up the judgment that vacation as of the precedent term, and it is a judgment at the common law as of the precedent term, though it be not so upon the statute of frauds in respect of *purchasors* but from the signing it; so that this judgment being a judgment at common law as of Hilary term, if the roll had been brought in before the *essoign day* of Easter term, it would then have been a judgment entered when the party was alive, and therefore good without question, per Holt Ch. J. but because of the mischief to *purchasors* by frustrating the statute of frauds, and the act for docketting of judgments, the Court would not allow [ 297 ] the filing it after the *essoign day* of Easter term. 1 Salk. 87. pl. 6. Hill. 1 Ann. B. R. Oades v. Woodward. — 3 Salk. 116. S. C. — If a man gives a warrant of attorney to confess a judgment the 1st day of the term, and dies, it may well be entered any time that term, according to

19. A man gives a warrant of attorney to confess a judgment, and dies before judgment is confessed, this is a countermand. Vent. 310. Pasch. 29 Car. 2. B. R. Anon.

to Shelly's Case, and the Dean of Salisbury's Case; per Cur. 6 Mod. 86. Mich. 2 Ann. B. R. Anon.

20. By the course of the Court judgment cannot regularly be entered on a warrant of attorney *after the year* without motion; resolved. Cumb. 226. Mich. 5 W. & M. in B. R. Anon.

S. P. And affidavit of the party's being living, especially the

defendant or the confisor, as also that the debt is not satisfied; and thereupon the Court made a rule accordingly. 2 Show. 252. pl. 259. Mich. 34 Car. 2. B. R. Pagram's Case.

21. 4 & 5 Annæ, cap. 16. s. 3. Enacts, that the attorney for the plaintiff or demandant shall file his warrant of attorney the same term he declares, and the attorney for the defendant or tenant shall file his warrant of attorney the same term he appears, under the penalties inflicted by any former law for default of filing their warrants of attorney.

22. It is time enough to file warrants of attorney any time before final judgment, per Cur. and they said, that the plea is depending till judgment final is given, and the warrant is to be intended previous to the appearance, though not filed. Gibb. 191. pl. 4. Hill. 4 Geo. 2. B. R. Brook v. Manning.

(K) For whom he may be Attorney. [Or who may be Attorney for whom.]

[1. IN an action by the commonalty of a town, one of the commonalty cannot appear as attorney for the commonalty; for he is party to the action. 3 H. 6. 43.]

Br. Corporations, pl. 2. cites S. C. where this excep-

tion was taken, sed adjournatur. But Brooke says, it seems clearly that he may well be; it appears elsewhere, that one of the commonalty may incoff the manor and commonalty. Br. Attorney, pl. 5. cites S. C. & adjournatur; and Brooke says, See tit. Corporations, several cases will prove that it may well be.

for (he is,) s)

(K. 2) Attorney at Law. Acts of his, what justifiable. And in what Courts he may act.

1. AN attorney may be a solicitor for his clients in other courts as well as in the Court where he is an attorney, and a promise to pay him for it is lawful, per tot. Cur. Cro. C. 159. pl. 8. Paich. 5 Car. B. R. Thurstby v. Warren.

Jo. 208. pl. 7. S. C. — An attorney may lawfully solicit a cause in

Chancery; resolved. Mar. 78. pl. 123. Mich. 15 Car. Kelway's Case.

2. The steward of an inferior court refusing to let an attorney of B. R. appear for the defendant, in an action in that court, he moved that the attorneys in the Courts at Westminster might practise in any inferior court, and that they had not a prescription or charter for any certain number of attorneys of their own, and to exclude others; but because it was the general usage of those Courts to suffer

The Court said, that attorneys of B. R. should be allowed [ 298 ] to practise in any inferior

court, either in the Marshalsea or elsewhere (except in London &c. which are by parliament) but because the attorney in this case was of ill fame, the Court would not intermeddle. Sid. 410. pl. 4. S. C. and say, that in Mich. following was the following Case, viz. The prothonotary of Stepney Court (which is a newly erected Court) refusing to admit an attorney of B. R. to appear for his client there, the Court of B. R. directed him to bring an action against the prothonotary for *sub refusal*, and the Court said, that attorneys here shall be allowed to be attorneys in all inferior courts that are by patent, though their patent expressly says there shall be but so many, and those to be admitted by such persons as in Stepney and the new Court of Marshalsea, Sid. 410. Hastings's Case. — Mod. 23. pl. 61. S. C. and the Court inclined accordingly. — 2 Keb. 584. pl. 126. the Court said an attachment ought to go; but adjourned.

### (K. 3) Privilege in Actions, and as to Offices.

1. THE Court (absente Morton, & dubitante Rainsford) granted a writ of privilege to an attorney, though he was obliged by his tenure to be Lord's Reeve; for the privilege is presumed more ancient than the creation of the tenure, or at least shall be preferred, in as much as it concerns the administration of justice. Vent. 29. Pasch. 21 Car. 2. B. R. Stone's Case.

2. And per Kelynge, an attorney cannot be amerced for not doing suit to his Lord's Court at such time as his attendance is required at Westminster. Vent. 29. per Kelynge. Pasch. 21 Car. 2. B. R.

3. Attorney is at election to sue either by original or by privilege. Vent. 199. Pasch. 24 Car. 2. B. R. Seaman v. Dec. But if he sue by original he must declare as others do, and not upon his privilege. 2 Lev. 39. S. C.

4. Where an attorney is joined with others in an action he shall have no privilege. Vent. 298. Mich. 28 Car. 2. B. R. Molyne v. Cook. 2 Salk. 544. pl. 5. Branthwait v. Blackerby. Hill. 9 W. 3. B. R. the S. P. — 12 Mod. 163. Hill. 9 W. 3. in Case of Broadwaite v. Blackerby and Perkins.

5. Attachment of privilege is but as a latitat, not as an original, per Holt Ch. J. Show. 376. Trin. 4 W. & M. Rudd v. Berkenhead.

6. Filing bail by attorney defendant does not oust him of his privilege, and though it gives others an opportunity to deliver declaration against him by the by, according to the course of B. R. yet that practice extends not to exclude such defendant from any advantage by pleading to the jurisdiction of the Court, or otherwise; but per Cur. if the defendant had waived his privilege by pleading in chief to the first action, and the plaintiff in an after action had shewn that waiver in his replication, then the defendant would have been ousted of his privilege in such 2d action, because a waiver of privilege in a prior action depending in B. R. is a waiver in all other actions commenced in that term. Carth. 377. Pasch. 8 W. 3. B. R. Bands v. Bodinner.

7. If an attorney of C. B. is in *actual custody* of the marshal of B. R. by process there he cannot plead his privilege in any action on any bill filed against him, for if he should there would be a failure of justice, per Cur. Carth. 378. Pasch. 8 W. 3. B. R. Bands v. Bodinner.

12 Mod.  
113. Hill. 8  
W. 3. S. C.  
by the same  
name, and  
also of Stone  
v. Bodiner.  
—1 Salk 1.

S. C. by name of Jones v. Bodiner.

8. If attorney of C. B. is brought into B. R. *at the suit of an* [ 299 ] attorney there, which is an estoppel to the defendant's privilege, even in such case the defendant shall be *ousted* of his privilege in all other actions commenced against him in R. R. in the same term, because the jurisdiction of B. R. is attached upon him by the first action. Carth. 378. Pasch. 8 W. 3. B. R. Bands v. Bodinner.

9. Being in *custody of the marshal on bail filed*, unless in *actual custody*, does not hinder an attorney of his privilege. 12 Mod. 113. Hill. 8 W. 3. Bands and Stone v. Bodinner.

10. *Bill cannot be filed against an attorney in vacation*, for you must declare against him as *present in Court*, to which the Court agreed; and Mr. Ashton and Sir Samuel Ashtree certified the practice to be so, and that it was never used to file a bill in vacation; for to be a bill of a subsequent term, the bill must be filed *sedente Curia* the last day of the term. 12 Mod. 163. Hill. 9 W. 3. Broadwite v. Blackerby and Perkins.

2 Salk. 544.  
pl. 5. Brant-  
thwaite v.  
Blackerby.  
S. C.

11. *Bill against an attorney must be filed in full term*, and it is not enough that it should be on any of the *essoign days*. 6 Mod. 106. Hill. 2 Ann. B. R. Anon.

It may be  
filed any  
day within  
the term,  
and if there

are 4 days of the term to come, one may serve rules upon it that term, but if the declaration be in *Easter vacation*, which is indeed a declaration of Easter term, the defendant shall have 4 days in Trinity term to plead, and one is not confined to 4 days to *plead in abatement*; but he has the whole term of which the declaration is delivered; but if he has 4 days in the term of which the declaration is, he shall not plead in abatement the next term; per Cur. 6 Mod. 175. Trin. 3 Ann. B. R. Anon.

12. If an attorney is responsible, and justifies, and a house-keeper, then he is *good bail* though he is an attorney; but the meaning of the rule was that he should not be taken as good bail merely by his being an attorney. 8 Mod. 388. Mich. 11 Geo. Brown v. Combs.

## (L) What shall be said to be a *Removal in Law*.

[1. IF the tenant makes an attorney in Banco, and after consuance of this plea is demanded by a franchise, and granted, the attorney shall *continue attorney for him in the franchise also*, without other making, and he is his attorney there in fact before other removal, for the consuance is granted to hold plea as the justices ought, if this had not been granted. \* 21 Ed. 3. 45. b. 61. 21. Ass. pl. 17. adjudged.]

\* Br. Error;  
pl. 64. cites  
S. C. & S. P.  
accordingly;  
but the at-  
torney is not  
bound to go  
to the fran-  
chise.—

Pr. Attorney, pl. 35. cites S. C. & S. P. accordingly, nor is he bound to go with him to the nisi prius en pais, nor does action of disceit lie against him for any such absence. — Fitz. Rec. sigt, pl. 3. S. C. — Br. Conscience, pl. 25. cites S. C. & S. P. awarded accordingly. quod nota, that this is of record in the franchise, and yet the warrant was not sent to the franchise, nor it was not comprised in the record which was sent to the franchise that he is attorney there, and yet judgment as above.

[2. So if after the conscience granted, a *re-summons* be sued for the failure of right there in the Court where this was granted, he continues attorney for him there also upon the first retainer. 21 Ass. pl. 17. 21 Ed. 3. 61. b.]

Fitzh. Rec. cōipt. pl. 13. cites 21 E. 3. S. P. [300]

[3. If judgment be given in *Banco* against the demandant, and this is reversed in B. R. for error in the process; the attorney which the tenant had in the first plea shall continue his attorney now in B. R. to answer to the original. 21 Ass. pl. 17. 21 Ed. 3. 61. b.]

Br. Garrant de Attorney, pl. 45. cites S. C.

4. In *detinue*, the plaintiff made attorney and counted, and the defendant alleged *ivery* to him by the plaintiff and J. N. and prayed garnishment, and had it, and he appeared, and the plaintiff would have counted against him by the same attorney, and he said that the warrant of attorney shall not serve against him; and per tot. Cur. the warrant shall serve well, quod nota. Br. Garrant de Attorney, pl. 6. cites 7 H. 4. 3.

Br. Garrant de Attorney, pl. 45. cites S. C.

5. And per Brench. in writ of ward the plaintiff made attorney, the defendant prayed enterpleader, because J. N. had brought such a writ of the same ward, the warrant shall serve against the other plaintiff upon enterpleader; but Rickhill contra; but per Skrene, where the defendant in replevin makes attorney against the plaintiff, and avows upon a stranger, the warrant shall serve, and so it seems to be law, that a warrant of attorney against the tenant shall serve against the vouchee or prayee in aid, for there is privity. Ibid.

6. Where a man makes attorney, and after the parol is put without day by protestation, by which *re-summons* is sued, the tenant at the day cannot be essoigned, for he has attorney in Court, and so see that he remains notwithstanding the parol be without day; for the re-summons is to renew the first record, in which he is attorney. Br. Attorney, pl. 39. cites 19 H. 6. 57.

1 Salk. 799. pl. 2. Pasch. 9 W. 3. Anon. accordingly as to the first point, because in that case the husband would be charged.

7. A warrant of attorney made by a *feme sole* to confess a judgment, is revoked by marriage; but otherwise of a warrant made to her. 1 Salk. 117. pl. 9. Hill. 1 Annæ B. R. Anon.

Fol. 291.

(M) What shall be said an Expiration, or Determination of the Letter.

[1. IN debt, if the defendant wages his law by attorney, at the day that he hath to make his law the attorney may plead the release of the plaintiff after the last continuance. 22 E. 3. Attorney 92. For his warrant was not determined, though his master ought to make his law in person.]

[2. In



[2. In debt, after judgment given, the attorney of the plaintiff cannot release the damages, because his power after the judgment is determined. 4 Ed. 3. Itinere Darb. titulo Attorney 18. adjudged.]

In debt the defendant made his law, by which the plaintiff recovered his debt, and his damages as he had counted; but the attorney released his damages to 100s.

Quod nota. Br. Attorney, pl. 21. cites 46 E. 3. 16. — Br. Attorney, pl. 23. cites S. C. Roll Ch. J. conceived the warrant of attorney not determined by judgment given in the suit in which he was retained; for the suit is not determined, because the attorney after the judgment is to be called to say why execution should not be made against his client, and he is trusted to defend his client as far as he can from the execution. 6ty. 426. Mich. 1654. Lawrence v. Harrison.

[3. If a man recovers damages in trespass, and the defendant comes upon the exigent, and says he hath agreed with the plaintiff, the attorney of the plaintiff shall not be received to acknowledge this, because his power is ended by the judgment given. 34 Ed. 3. Attorney 95. adjudged.]

By the judgment against the defendant the warrant of attorney is

determined; for thereby placitum terminatur unless only to sue execution (which is the fruit of the judgment) within the year; and if he sues out execution within the year, he may prosecute the same after the year; but if he does not sue out the execution within the year, then, after the year is ended, after judgment his warrant of attorney is determined. 2 Inst. 378 — S. P. Arg. and agreed by Coke Ch. J. Roll. Rep. 366.

[4. But if the attorney, after judgment given for his master, receives the money levied upon the execution, he may acknowledge satisfaction. P. 14 Jac. B. R. per Coke.]

S. P. and it is as well as if he had delivered the same,

or the goods taken in execution to the plaintiff himself; for the receipt of the attorney is in law his own receipt. Godb. 217. pl. 111. Mich. 11 Jac. C. B. in Case of Strowbridge v. Archer. — S. P. and this without any new warrant, because it is for the plaintiff's benefit, but otherwise it is if he acknowledges satisfaction without such receipt, Arg. Quod fuit concessum, per Coke Ch. J. Roll. Rep. 166. Pasch. 14 Jac. B. R. — See tit. Actions, (T) pl. 1. — After judgment the attorney on record may receive and acknowledge satisfaction by virtue of his former warrant; per Cur. 12 Mod. 410. Hill. 12 W. & M. Anon.

[5. So after judgment the attorney of the plaintiff may acknowledge satisfaction, although he receives none of the money. P. 14 Jac. B. R. said by the clerks that it is the common course.]

After judgment the attorney on record may receive and acknowledge

satisfaction by virtue of his former warrant. 12 Mod. 440. — S. P. accordingly by the clerks, and Doderidge agreed that it might well be, but Coke seemed e contra. Ibid. 367. pl. 19. Pasch. 14 Jac. B. R. in Case of Payne v. Chute. — See tit. Actions (T) pl. 1.

[6. If one man makes another his general attorney in all pleas to hold till a certain time, and after, before the time expired, he appears in an action for him; and after pending this plea the time passes, yet his warrant is not determined; for he who is attorney at one time, is an attorney at all times pending the plea, if he be not removed. 15 Ed. 3. Attorney 70.]

\* The court of B. R. is, that if an attorney enters a cause no other can intermeddle without the consent of the other, or his death. 2 Roll Rep. 456. Trin. 2 Jac. B. R.

7. A man recovered damages, and had capias ad satisfac. against the defendant for malice, where the defendant tendered the money in Court, and upon this surmise the attorney of the defendant was compelled to receive the money, and superfedas was awarded; quod

quod nota; and therefore it seems that the *warrant of attorney of the plaintiff* is not expired by the judgment. *Contra* of the *warrant of attorney of the defendant*, as it is said. Br. Garran de Attorney, pl. 48. cites 22 E. 3. Fitzh. Suggestion, 19.

Br. Garran de Attorney, pl. 8. cites S. C. —  
Br. Attorney, pl. 20. cites S. C.

8. In *scire facias* upon a fine the tenant made default, and two barons and their femes prayed to be received in jure uxorum, and the resceit traversed, and found surety of issues, and at the venire facias the prayees appeared by attorney, and the plaintiff alleged that the one baron was dead, and demanded execution of the moiety, and the feme was demanded, and did not come; and it was held clearly that the warrant of attorney is expired, and after writ of the Chancery was shewn, rehearsing that they were received, and that the baron was dead, and the feme sick, and commanded them to receive them by attorney, and because the writ rehearsed the resceit where the resceit was traversed, therefore it was held a void warrant, by which he vouched another warrant in the Chancery, and pending this in debate the feme came the next day, and prayed to be received, and was received; and the opinion of the first warrant's being void was changed, and that it is good for the feme; as in quare impedit by baron and feme, who are by attorney, if the baron dies the warrant remains; and that upon resceit shall be new plea, new issue, and new process, and that the prayees cannot sever in answer. Br. Resceit, pl. 34. cites 7 H. 4. 19.

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The warrant of the plaintiff's attorney remains to sue execution by heri facias or scire facias within the year, and not after

9. A man was condemned in debt, and exigent ad satisfac. was awarded, and came the attorney of the plaintiff, and would have confessed the satisfaction of his master after the year; and by all the justices his warrant is expired after the year to confess any satisfaction; but his warrant remains to sue execution as well after the year as before &c. if the process of execution was commenced within the year, by which he made a new warrant to confess &c. Br. Garran de Attorney, pl. 2. cites 33 H. 6. 49.

the year. Br. Attorney, pl. 11. cites 34 H. 6. 31. — Br. Garran de Attorney, pl. 3. cites S. C. — 2 Inst. 378. says, that by the judgment against the defendant the warrant is determined; for thereby placitum terminatur but only to sue execution, which is the fruit of the judgment, within the year, and if he sues out execution within the year, he may prosecute the same after the year. — Jenk. 53. at the end of pl. 100. S. P.

10. And by the reporter the first warrant shall not serje to sue *scire facias* after the year. Br. Garran de Attorney, pl. 2. cites 33 H. 6. 49.

Br. Garran de Attorney, pl. 2. cites S. C. —

11. Where the defendant is condemned in debt at the suit of the King, and gets release or pardon, the warrant of attorney is expired to plead it. Br. Attorney, pl. 11. cites 34 H. 6. 31.

Br. Charter de Parson, pl. 11. cites S. C.

Br. Saver Leault, pl. 20. cites S. C.

12. In *præcipe quod reddat* the tenant and his attorney made default at the nisi prius in pais, and excused it by increase of water at the way in Bank, so that he or his attorney could not come without danger of life; and it was held by some, that this plea cannot be pleaded by attorney; for his warrant is expired by his default at the day

*day of nisi prius*, and therefore cannot be pleaded-but in person. *Quære inde.* Br. Garrant de Attorney, pl. 20. cites 38 H. 6. 31.

13. The plaintiff's attorney, after judgment in debt, cannot acknowledge satisfaction within the year; for as to that, his warrant expires by the judgment; but his warrant continues as to suing execution within the year, but the defendant's warrant utterly expires when judgment is given. Jenk. 53. pl. 100.

14. Defendant at 8 o'clock in the morning gave a warrant of attorney to confess judgment in debt to the plaintiff, and at 10 o'clock before judgment signed, died; but resolved it was well obtained, it being for a good debt. Raym. 18. Trin. 13 Car. 2. B. R. Andrews v. Showell. 7 Mod. 95. S. C. & S. P. per Holt Ch. J. and that the course has been so time out of mind.

15. A warrant of attorney to confess a judgment is not revocable, and the Court will give leave to enter up the judgment, though the party does revoke it; per Holt Ch. J. 1 Salk. 87. pl. 6. Hill. 1 Ann. B. R. Oades v. Woodward.

16. Upon a claim of *conusance*, or upon a writ of error, the attorney continues. Arg. cites 21 E. 3. 61. But Holt Ch. J. denied that the attorney continued upon the writ of error. 2 Ld. Raym. Rep. 896. Trin. 2 Ann.

17. A warrant of attorney to appear for the plaintiff in an action against the principal was granted to J. S. and the plaintiff had judgment, and upon return of the *sci. fa.* against the bail appeared by J. S. his old attorney, who acted as such through the whole without having any new warrant; and upon execution awarded against the bail, and error brought, Holt Ch. J. said, that any one might sue out the *sci. fa.* and therefore J. S. might do it, but that when the *scire facias* is returned, then the plea began, and a new warrant of attorney ought to have been entered, *quod querens ponit loco suo &c.* for the warrant to appear in the principal action is no warrant to appear in the *scire facias* against the bail, because it is a new cause and a different record. Judgment was reversed. 1 Salk. 89. pl. 11. Pasch. 5 Ann. B. R. Burr v. Atwood. Carth. 447. Pasch. 10 W. 3. S. C. but S. P. does not appear. 3 Salk. 369. pl. 6. Mich. 1 Annæ S. C. but S. P. does not appear. 7 Mod. 2. Pasch. 1 Ann. Atwood v. Burr, S. C. but S. P. does not appear.

## (N) What shall be said to be a Removal in Fact. [ 303 ]

[1. IF the Court records that the attorney is removed, this is sufficient without an entry of the removal. 24 E. 3. 37.] Fitzh. Attorney. pl. 70. cites S. C. and

therefore though he prayed oyer of the removal it was denied him.——When an attorney is removed is changed, the record ought to mention specially that it was by consent of the Court. 12 Mod. 440. Hill. 12 W. 3. Anon.

2. Where a man has an attorney he cannot disavow him, because he has warranty of record, but shall have his writ de attorney remoto removendo, or writ of disceit if he pleads other plea than his master will, or faintly in disadvantage of his master, per Ashton,

apprentice; but this was clearly denied, and that before plea pleaded he may well disavow him to proceed further, and if the plea be pleaded faintly to have his writ of disceit; and so it seems, that *after the plea pleaded, and entered, and recorded, it shall remain, clearly; quod nota; and good reason.* Br. Attorney, pl. 37. cites 8 H. 6. 8.

### (O) Who may remove him.

Br. Attorney, pl. 14. cites S. C. & S. P. [1. **I**N a writ of ward brought by baron and feme by attorney, the feme may remove the attorney *without the consent of the husband.* 21 Ed. 3. 12. adjudged.]

accordingly, and therefore because the feme was nonsuited, it was adjudged the nonsuit of the baron and feme. — Fitzh. Attorney, pl. 91. cites S. C.

*Trespass by baron and feme, the defendant appeared in proper person, and the plaintiff appeared by attorney and counted, and the defendant appeared to another term, at which day the feme came, and would have disavowed the attorney, and per Moile she may; for the feme was executrix of the first baron with another who refused, and this action is brought to make him take the administration upon him, which is not reason; but per Prisot, the feme cannot disavow the attorney put in by her baron, and it is her folly, as where she has lease for life, and takes baron, who does waste &c. & adjournatur; and by him if the baron pleads, and she comes and pleads another plea, the plea of baron shall be taken.* Br. Attorney, pl. 9. cites 33 H. 6. 31.

8. P. accordingly, if the attorney be on record. 2. No man can change his attorney without *leave of the Court.* 12 Mod. 99. Trin. 8 W. 3. Anon.

12 Mod. 440. per Cur. Hill. 12 W. 3. Anon.

3. Plaintiff proceeded against the principal and bail, and the principal ordered an attorney to appear for them both, and though the bail complained against this, yet the Court would not relieve him, but bid him proceed against the principal, especially the attorney being able to answer damages. 12 Mod. 579. Mich. 13 W. 3. Anon.

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### (P) The Power of an Attorney.

[1. **I**F A. acknowledges a recognizance to B. of 100l. to be paid at a certain day, at which day A. comes and proffers the money in Court, and because B. was in the King's service, E. his general attorney comes ready to receive the money, and shews his warrant to the Court, which was, that he should be his attorney in pleas and quarrels, and this recognizance is a thing determined, which is no plea nor quarrel, therefore his warrant does not extend to it. 18 Ed. 2. Execution 245. adjudged.]

[2. And upon such a recognizance within the year, such general attorney shall not have any *feri facias* against the cosutor, but only a *scire facias*, in which the defendant may have his plea. 18 Ed. 2. Execution 245.]

3. *Affide*

3. *Affise against baron and feme, who appeared by attorney, and pleaded in bar, and at another day the baron came in person, and pleaded release of the plaintiff, and was not suffered, because he had made attorney without the assent of the attorney, by which the attorney assented.* Br. Attorney, pl. 103. cites 26 Aff. 44.

4. If an attorney confesses the letters patents to be the letters of his master, this shall bind him as well as confession of action by attorney. Br. Attorney, pl. 60. cites 39 H. 6. 32. per Cur.

5. The attorney's authority is twofold, viz. *expressed* in the warrant, or *implied* in law. Co. Litt. 52.

6. The act of the attorney shall *prejudice* his master in the principal matter; for if he confess the action without the consent and will of the master, this shall bind his master; but otherwise it is in collateral matters; per Montague and Haughton J. And per Doderidge J. the act of my attorney is my own act. 2 Roll Rep. 63. Mich. 16 Jac. B. R. in Case of Gray v. Gray.

7. If the plaintiff's and defendant's attorney do agree to things in order to the proceedings in their client's cause, which are *not manifestly prejudicial*, though the clients do afterwards *refuse to consent* to their agreement, yet the Court will compel the performance of it; for as they are attorneys, the law allows them to make such agreement, and if the clients should avoid them afterwards, it would be mischievous in delay of justice; per Roll Ch. J. L. P. R. 49.

8. After verdict in trespass in C. B. for the plaintiff, his attorney entered a *remittit damna* as to part. It was held that by his being constituted attorney he has authority to remit damages, and that a *remittitur* need not be by the plaintiff in propria persona, as a \* *retraxit* must. 1 Salk. 89. pl. 9. Hill. 2 Ann. B. R. Lamb v. Williams.

6 Mod. 82. S. C. and in error in B. R. held accordingly, and the same diversity. — \* Cro. J.

211. pl. 3. Mich. 6 Jac. B. R. S. P. by Fleming and Cook, in Case of Beecher v. Shirley. — 2 Rep. 138. a. Beecher's Case, S. C. & S. P. resolved. — Co. Litt. 138. a. 139. b. S. P. — Jenk. 283. pl. 12. S. C. & S. P. — S. C. cited and admitted. Ld. Raym. Rep. 598. Trin. 12 W. 3.

## (Q) Punishable for Misdemeanors.

[ 305 ]

1. **A**N attorney was imprisoned, because he appeared and obtained judgment in *quare impedit*, without warrant put in. Br. Attorney, pl. 33, cites 38 E. 3. 8.

Br. Imprisonment, pl. 16. cites S. C.

2. In *quare impedit*, attorney appeared for the defendant, and demanded the plaintiff, and nonsuited him, and obtained writ to the bishop against him, and after because it appeared that he had no warrant he was committed to prison. Br. Garrant de Attorney, pl. 12. cites 38 E. 3. 10.

Br. Imprisonment, pl. 16. cites 38 E. 3. 8. S. P. that he was committed to prison, till advise-

ment what further should be done with him; and execution was repealed, and writ of repeal awarded to the bishop.

1 Salk. 86.  
pl. 3. Mich.  
10 W. 3. B.  
R. per Holt  
Ch. J. S. P.

3. The attorney of the plaintiff who recovered in debt, was committed to the Fleet, because he *had not put in his warrant of attorney before verdict*, quod nota. Br. Imprisonment, pl. 3. cites 41 E. 3. 1.

4. Attachment denied against an attorney, who *appeared* for the plaintiff *without warrant*; but said an action on the case lies. Cumb. 2. Mich. 1 Jac. 2. B. R.

5. An attorney may receive a *bribe of his own client, when the reward exceeds measure, and the end of the cause of reward is against justice*, as if he takes a reward to raise a record, or cause another attorney to appear on the other side, and confess the action &c. per Hobart Ch. J. Hob. 9. pl. 18. Mich. 11 Jac. C. B. in Case of Yardley v. Ellis.

6. Attorney gave a *sheriff directions in writing what persons to return on a jury, and what not*, and for this offence he was picked over the bar. Mo. 882. pl. 1237. Pasch. 13 Jac. Han-son's Case.

7. If attorney *procures erroneous judgment* for his client, the other cannot have action on the case against him for it, unless he has procured it *by practice*; per 2 Just. Roll R. 403. pl. 48. Trin. 16 Jac. B. R. in Case of Gibson v. Mudford.

8. In trespass *after issue joined the plaintiff did not proceed, but retained another attorney, who altered the paper book, by putting in a new plea* for the plaintiff and also for the defendant, by adding & prædictus defendens similiter, without motion, or the defendant's consenting, *and so made the issue different from what it was*. The Court were minded to strike the attorney out of the roll, for thus altering the plea after nisi prius, and notice given for the trial, for though it may be altered before it be entered, yet the Court is to be moved, and the defendant to have costs. 2 Roll Rep. 459. Mich. 22 Jac. B. R. Sulliard's Case.

9. The statute of Merton, cap. 10. gave power to make attor-neys in any Court; cites Com. 236. but the attorney *must look at his peril that that which he doth be a lawful act*. Godb. 387, Arg. Pasch. 3 Car. B. R.

10. An attorney *prosecuted three several actions* of debt, *every one of them being above 40l. and so finable to the King, and procured judgments to be entered on all of them, no original being sued forth, but the attorney had received the charges*, as if they had been sued forth, and also the  *fines*  due to the King; it was ordered that this being done voluntary, and against his oath, which is, that he shall not practise any deceit, he should be put out of the roll, and cast over the bar, and committed to the Fleet, but he was not fined, being poor. Cro. Car. 74. Trin. 3 Car. C. B. Jerom's Case.

Litt. Rep.  
46. Fawne's  
Case; S. P.  
accordingly;  
and seems to  
be S. C.—  
Het. 29.  
S. C. in  
totidem  
verbis.—  
2 Inst. 115.  
upon Stat.  
Westm. 1.  
cap. 19. says that to sue out a capias without an original is a collusion in deceit of the Court men-  
tioned in that statute, and cites 26 H. 6. 37.

[ 306 ] 11. C. was in execution on a judgment; the plaintiff's attorney *without consent of his client, acknowledged satisfaction* on this judg-ment;

ment; afterwards the defendant's attorney without consent of his client, acknowledged another judgment for the same debt. The parties were left to their remedies against each other, but both the attorneys were committed for false practice. Sty. 129. Mich. 24 Car. B. R. Cage's Case.

12. The justices of nisi prius cannot commit the attorney for not bringing in the venire, but in case of a trial at bar it is always done, per Eyre J. Cumb. 304 Mich. 6 W. & M. in B. R. in Case of Jones v. the Earls of Montague and Bath.

13. An attorney was fined for assigning errors notoriously false and frivolous. 2 Salk. 515. Hill. 8 W. 3. B. R. Pierce v. Blake.

14. Attorney is not compellable to appear for any one, unless he takes his fee, or backs the warrant, and then the Court will compel him; per Cur. 1 Salk. 87. pl. 4. Trin. 11 W. 3. B. R. Anon.

15. H. an attorney of the Court, informed his client that he had entered up judgment two years before, but could not sue execution, by reason of a writ of error pending, when in truth there was no judgment entered, and for this notorious practice was ordered to answer interrogatories; and here it was agreed, that if interrogatories be not exhibited in a week, the recognizance entered into for answering them is discharged of course. It was likewise agreed by Court, and Sir Samuel Ashtree, Master of Crown Office, that in all cases the party has 4 juridical days to answer the interrogatories, though they be exhibited in vacation; but if he does not answer in that time, he is to be committed upon motion. 12 Mod. 310. Mich. 11 W. 3. Holland's Case.

16. It is a great misdemeanour in an attorney to take a warrant of attorney to enter judgment on a bond without a defeasance; and none but a sworn attorney can take such a warrant, per Holt. 12 Mod. 398. Pasch. 12 W. 3. Anon.

17. If one attorney gives leave to another to practice in his name, he shall answer for all the villanies and practices as he shall act in his name; per Holt Ch. J. 12 Mod. 666. Hill. 13 W. 3. Anon.

18. Motion for an attachment against an attorney, for procuring a tenant to be turned out of possession, by getting another to personate him on whom he delivered a declaration in ejectment. See 6 Mod. 16. Mich. 2 Ann. B. R. Holderstafte v. Saunders.

19. If there are 2 defendants and 2 attorneys, and one attorney assigns error &c. without authority from both, the Court cannot help him; but he must take his remedy against the attorney. 6 Mod. 40. Mich. 2 Ann. B. R. Shepherd v. Orchard.

20. Attorney was ordered to answer interrogatories for foul practice, for oppressing the defendant by threatening to take him by a warrant from the chief justice, and by colour thereof getting money from him, and a note under his hand to pay more for not sending him to Newgate, for a trespass pretended to be done to his wife. 8 Mod. 109. Mich. 9 Geo. 1. Wright v. Mason.

21. Plaintiff's attorney, after writ of error brought, artfully delaying

This is a great collusion in deceit of the Court. 2 Inst. 15. like point.

delaying signing his final judgment till the writ of error was spent, and then brought an action of debt upon the judgment. The Court ordered proceedings in the action upon the judgment to be staid, and a new writ of error to be brought at the plaintiff's attorney's expence. Barnes's Notes in C. B. 175, 176. East. 8 Geo. 2. Arden v. Lamley.

[ 307 ] 22. 12 Geo. 1. cap. 29. s. 4. *If any person convicted of forgery, or of wilful and corrupt perjury, shall practise as an attorney, solicitor, or agent, in any suit or action in any court of law or equity within England, the judges of the Courts where such suit or action is brought, shall, on complaint or information thereof, examine the matter in a summary way in open Court; and if it shall appear to the satisfaction of such judges that the person complained of hath offended, contrary to this act, the judges shall cause such offender to be transported for 7 years to one of his Majesty's plantations in America, in such manner and under such penalties as felons are by law to be transported.*

### (R) Actions by him for his Fees.

1. BILL of privilege is brought by attorney of debt due by his client. He shall be named attorney in the bill. *Contra* if he sues by original writ, and he may sue by bill, and may be sued by bill by the privilege; for præsens in Curia. Br. Bille, pl. 29. cites 3 E. 4. 26.

As to the giving a ticket of charges, this statute does not extend to a special action upon a promise. Allen 4. Mich. 22 Car. B. R. Evelyn v. Livermore.

2. 3 Jac. 1. cap. 7. *No attorney or solicitor shall be allowed any fee given to a serjeant or counsellor, or money given to the clerks in any of the Courts at Westminster for copies, unless he have a ticket subscribed by the serjeant, counsellor, or clerk, respectively, how much was received by them; and the attorney or solicitor shall give a bill of all other charges to his client, subscribed with his name, before he shall charge his client with any fees or charges. And if any attorney or solicitor willingly delay his client's suit to work his own gain, or demand by his bill any sum he hath not laid out, the party grieved shall have his action against him, and recover his costs with treble damages; and such attorney or solicitor shall be discharged from practising any more.*

The statute may as well be pleaded to an indebitatus assumpsit as to an action of debt, unless a special promise be laid; but to a special promise, or an *infulm computasset*, it is no plea; per Cur. 1 Salk. 86. pl. 1. Hill. 2 W. & M. in B. R. Berkenhead v. Fanthaw.——Show. 96. S. C.

Defendant pleaded the stat. 3 Jac. 7. against an action brought by an attorney, that he had not given a bill of charges; and good. 3 Salk. 19. Brooks v. Hayne.——Raym. 225. Mich. 30 Car. 2. C. B. S. C.

*Assumpsit* on 3 several promises, 1st, for money lent. 2dly, on a quantum meruit for business done as an attorney. And 3dly, on an *infulm computasset*. The defendant pleaded that the plaintiff gave him no bill before the action brought, according to the stat. 1 Jac. Per Cur. an account is clearly out of the statute, and it being pleaded to all the promises, the plea is ill for the whole; and judgment for the plaintiff. Comb. 126. Trin. 1 W. & M. in B. R. Gordon v. Powell.——Show. 48. Jordan v. Powell, S. C. adjudged for the plaintiff.——Carth. 57. S. C. adjudged for the plaintiff without argument, because the statute extends only to money due for fees, and here the defendant had pleaded generally to all the promises laid in the declaration, and one of them being an *infulm computasset*, in which other money may be included, and so if the defendant would have the benefit of the statute, he ought to have pleaded quoad the 2 first promises, and not generally to all.

Indebitatus assumpsit was brought by an attorney of B. R. for his fees and disbursements in defending



*sending a suit in an inferior court.* The defendant pleaded the stat. 3 Jac. cap. 7. and the Court held that this statute extends only to attorneys in the courts at Westminster. 1 Salk. 86. pl. 1. Hill. 2 W. & M. E. R. Berkenhead v. Fanhew.——Show. 96. Brickwood v. Fanhew, S. C. and judgment for the plaintiff.——Carth. 147. S. C. adjudged accordingly.

3. An attorney brought an action of debt upon 8 several retainers, in all of which, except 3, the *defendant had retained him to be attorney for another quamdiu placuerit the plaintiff and defendant capiendo his fees and expences of suit of the defendant*, and the other 3 retainers were in the defendant's own actions. After judgment for the plaintiff, error was brought, for that although an attorney may have an action of debt for his fees &c. yet it ought to be against him for whom he is attorney, and not against the servant or solicitor who only retained him; but this was overruled upon reading the record that the defendant retained him capiendo of him the fees, which made it a good contract, and therefore the action well lies. The judgment was affirmed. Cro. J. 520. pl. 4. Hill. 16 Jac. B. R. Bradford v. Woodhouse.

An attorney brought debt against one who had retained him to prosecute a suit for another, and promised to pay his fees, the plaintiff had a verdict; and upon a writ [ 308 ] of error brought, all the Court

held, that *debt lies not here but case only*, for the retainer being for another man who agreed thereto, there is no cause of debt between him who retained and the attorney, and no contract or consideration to ground this action, but he may well have debt against him for whom he was retained; and so judgment was reversed. Cro. Car. 192. pl. 4. Trin. 6 Car. B. R. Sands v. Trevilian.——This case was denied to be law; for though soliciting in J. N.'s cause will not raise a contract from J. S. yet an express promise from J. S. to pay for the solicitations of J. N.'s cause will make it a debt, and the Ch. J. said, he thought Roll's argument in the Case of Sands v. Trevilian not to be answered. 2 Show. 421. pl. 387. Hill. 36 & 37 Car. 2. B. R. in case of Amaroos v. Roz, where it was held that an indebitatus lay.——Skin. 217. S. C. accordingly.——An indebitatus assumpsit will not lie for being an attorney to a 3d person, because in that case his being attorney on record is what intitles him to debt; and therefore if another promises to pay, yet he for whom he is attorney on record is not discharged, and therefore the other cannot in that case be liable to an indebitatus; per Holt. Ch. J. 7 Mod. 149. Hill. 1 Anne B. R.

4. Attorney brought an indebitus assumpsit for fees, and says *not in what court* the fees were, and yet it was held good; for pro opere & labore hath been allowed. Cumb. 337. Trin. 7 W. 3. B. R. Anon.

5. No rule ought to be made for *referring an attorney's bill* delivered to his client, unless there be an action pending thereon. 1 Salk. 332. pl. 8. Pasch. 9 W. 3. B. R. Springate v. Springate.

6. An attorney of B. R. sued in the Sheriff's Court for his fees, and upon motion he was forced to refer it to the master; for that his person is under the power of the Court. 12 Mod. 251. Mich. 10 W. 3. Beal's Case.

7. Executor of an attorney brought an action for fees, and law business done by his testator. The defendant moved to have the plaintiff's demand referred to the master; but denied, because all the *business was done in another Court*; otherwise had it been done in this Court, or partly in this; besides the plaintiff was executor. 1 Salk. 89. pl. 10. Pasch. 5 Ann. B. R. Gregg's Case.

8. Attorney encourages A. to sue B. and tells him if he will let him prosecute B. it shall not cost him a farthing, yet after business done

done action lies for the attorney against A. Per Eyre Ch. J. in C. B. 1726.

9. 2 Geo. 2. cap. 23. s. 22. Enacts, That no attorney or solicitor of any of the said Courts shall commence or maintain any action for fees, disbursements at law or in equity, till the expiration of one month after he shall have delivered to the party, or left for him at his dwelling-house, or last place of abode, a bill of such fees &c. written in a common hand, and in English (except law terms and names of writs), and in words at length (except times and sums), which bill shall be subscribed with the proper hand of such attorney or solicitor; and upon application of the party chargeable by such bill, or of any other person in that behalf authorized, to the Lord Chancellor or the Master of the Rolls, or any of the courts aforesaid, or to a judge or baron of any of the said courts, in which the business contained in such bill, or the greatest part thereof in value shall have been transacted; and upon the submission of said party, or such other person authorized to pay the sum that upon taxation shall appear to be due, it shall be lawful for the Lord Chancellor &c. to refer the said bill (though no action or suit shall be then depending in such Court touching the same) to be taxed by the proper officer, without any money being brought into Court; and if the attorney or solicitor, or the party chargeable by such bill, having due notice, neglect to attend such taxation, the officer may proceed to tax the bill *ex parte* (pending which reference and taxation no action shall be prosecuted touching the said demand), and upon taxation of such bill the party shall pay to the attorney or solicitor, or to any person by him authorized, that shall have been present at the taxation, or as the Court shall direct, the sum which shall be found due, which payment shall be a discharge of the bill, and in default thereof the party shall be liable to an attachment or process of contempt, or such other proceedings at the election of the attorney or solicitor, as such party was before liable to; and if on such taxation it shall be found that the attorney or solicitor shall have been overpaid, he shall refund to the party intitled, or to any person by him authorized, if present at the settling thereof, or otherwise as the Court shall direct, all the money that the officer shall certify to have been overpaid; and in default thereof the attorney or solicitor shall in like manner be liable to an attachment, or process of contempt, or such other proceeding, at the election of the party, as he would have been subject to if this act had not been made; and the said Courts are required to award the costs of such taxation to be paid by the parties according to the event of the taxation, viz. if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs; but if it be not less, then the Court in their discretion shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bills.

[ 309 ]

(S) What Pleas the Defendant may plead after his making an Attorney.

1. **I**N *replevin* of beasts, notwithstanding that the defendant has made attorney against the plaintiff, yet he may say after, *that the plaintiff is his villein*. Thel. Dig. 207. lib. 14. cap. 6. f. 1. cites 3 E. 3. 69. 101. and Pasch. 29 E. 3. 24.

2. In writ against the warden of an hospital and two freres, the freres after they had made attorney were received in proper person to plead to the writ, because they were not named confreres to any. Thel. Dig. 207. lib. 14. cap. 6. f. 2. cites Mich. 6 E. 3. 278.

3. And in *dower against a guardian*, after that he has made attorney, he may say in proper person *that he is not guardian*. Thel. Dig. 207. lib. 14. cap. 6. f. 3. cites Hill. 8 E. 3. 383.

4. And so may he do in assise of *mortdancestor*. Thel. Dig. 207. lib. 14. cap. 6. f. 1. cites 22 Ass. 4.

5. After making an attorney in a personal action, the defendant cannot say *that there are two others of the same name within the county as he is, and demand judgment of the writ*, because the plaintiff has not given a diversity of names. Thel. Dig. 207. lib. 14. cap. 6. f. 4. cites Pasch. 28 E. 3. 94.

6. It is held for law, that after making an attorney, the defendant in proper person cannot plead *misnomer of himself*; but otherwise it is if he be within age at the time that he made attorney. Thel. Dig. 207. lib. 14. cap. 6. f. 5. cites Mich. 3 H. 6. 16. 32 H. 6. 36. and 19 H. 6. 2.

7. Where a man appears as attorney for a corporation which is *misnamed*, and *imparles*, they shall not plead *misnomer* in abatement of the writ after, notwithstanding that he has not put in his warrant; for the Court compelled him to have warrant, and if the party comes and tenders to disallow him, this shall not be admitted, but he shall have action upon the case against the attorney, and the corporation was not suffered to put warrant in according to their true name; quod nota. Br. Garrant de Attorney, pl. 15. cites 15 H. 7. 14.

8. Action against the Dean and Chanons of the Chapter of St. S. in Westminster, they appeared by attorney and imparled, and after came and said, *that they were founded &c. [by the name of] St. Mary and St. Stephen &c.* judgment of the writ; and by all the justices he shall not have the plea, and though there be no warrant in, the Court shall compel the attorney to put in warrant. Br. Attorney, pl. 49. cites 15 H. 7. 14.

[ 310 ]

(T) Plead-

(T) Pleadings. What Pleas Attorney may plead.  
And what shall be said contrary to his Warrant.

Where one  
is made ge-  
neral attor-  
ney, accord-  
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name and  
surname of  
his master,  
hemay plead  
misnomer  
of his mas-  
ter. Thel.  
Dig. 200.  
lib. 12. cap. 15. f. 3. cites Mich. 8 E. 3. 421. but not of the proper name of his master. Attorney 84.

1. IT was held, that attorney cannot plead *misnomer of his master by matter in fact averrable per pais*, but he may plead a thing apparent which falls in law, and in judgment of the Court; and yet the writ there was brought against the guardian of an hospital, and against one *Frere Rob. and Frere Rich.* who would have abated the writ by plea of attorney, in as much as they were *not named confreres*, and were not received by Herle. Thel. Dig. 200. lib. 13. cap. 15. f. 1. cites Mich. 6 E. 3. 278. Quere.

2. In dower against a guardian of the land and heir &c. the tenant by attorney cannot plead that he has nothing but only for term of years of the lease of such a one who is guardian &c. judgment of the writ &c. Thel. Dig. 200. lib. 13. cap. 15. f. 2. cites Hill. 8 E. 3. 383. per opinionem.

3. In formodon against A. and Jo. one Ro. answered as guardian for A. and as attorney for Jo. and took the entire tenancy severally for each of them, *abique hoc* that the other any thing had &c. and it was said that he may well do so, notwithstanding that he be the same person. Thel. Dig. 200. lib. 13. cap. 15. f. 4. cites Hill. 12 E. 3. Attorney 71.

4. In trespass against Jo. Bereforde, and Jo. the son of Adam Bereforde. Jo. Bereforde by attorney was received to say, that he and Jo. the son of Adam was the same person. and so twice named &c. but otherwise it should be if the attorney had his warrant of attorney for Jo. son of Adam Bereforde also &c. Thel. Dig. 201. lib. 13. cap. 15. f. 5. cites Pasch. 17 E. 3. 24.

5. In writ against the prior of Wigorn. it was pleaded by attorney, that there was the prior de freres preachours, and there the prior de nostre dame in Wigorn. judgment of the writ for non-certainty &c. and it was held good, per Cur. Thel. Dig. 201. lib. 13. cap. 15. f. 8. cites Mich. 25 E. 3. 48.

Thel. Dig.  
201. lib. 13.  
cap. 15. f. 9.  
cites S. C.  
but says, for  
that Herle  
doubted  
thereof,  
Mich. 6 E. 3. 278. but the reporter held the plea good.

6. Affise against a feme, and her attorney pleaded, that she was covert baron, her baron not named; judgment of the writ &c. and some said, that the attorney shall not have the plea, but the affise was awarded thereupon; quod nota; and so he had the plea. Br. Garrant de Attorney, pl. 23. cites 25 Aff. 18.

7. The defendant by attorney pleaded that the plaintiff is villain regardant to his manor &c. and held good, but it seems that he was his general attorney in all pleas, who might well plead such plea.

plea. Thel. Dig. 201. lib. 13. cap. 15. f. 10. cites Trin. 31 E. 3. Attorney 68. and says, it is a good plea by attorney. 39 E. 3. 47. 22 Aff. 4.

8. In precipe quod reddat, per Finch & Mowbr. a man shall not say by attorney *that he is a villain, and holds in villeinage of J. not named*, judgment of the writ, for his person shall not be bound villein by attorney; contra in person. Br. Attorney, pl. 15. cites 41 E. 3. 8.

[ 311 ]  
F. N. B. 27.  
(A) in the new notes there (a) cites 21 E. 3. 10. a. 3. p. —  
Attorney for

defendant cannot *confess that his master is a villain*. Thel. Dig. 201. lib. 13. cap. 15. f. 6. cites Hill. 21 E. 3. 9.

But he may say *that his master holds in villeinage*, which amounts to nontenure. Thel. Dig. 201. lib. 13. cap. 15. f. 6. cites Hill. 21 E. 3. 9. and 41 E. 3. 8

9. But in trespass the defendant was permitted to *confess that he is villein to the plaintiff, by attorney*, quod mirum. Br. Attorney, pl. 19. cites 44 E. 3. 2.

Thel. Dig. 201. lib. 12. cap. 15. f. 11. cites S. C. and Hill.

13 H. 4. Villeinage 40. — If the plea of villeinage be in bar, it may be pleaded by attorney. F. N. B. 27. (A) in the new notes there (a) cites 29 E. 3. 41. a. b. and Kelw. 135. — An attorney for a plaintiff or defendant cannot confess villeinage in his client; for his warrant ad perendum vel lacrandum goes to the matter of the suit, and not to the person. Jenk. 283. in pl. 12.

10. A prior by attorney was received to *plead that his master was commoign to such an abbot*, removable at will, who has no covent, nor college, nor common seal &c. Thel. Dig. 201. lib. 13. cap. 15. f. 12. cites Mich. 44 E. 3. 32.

Trespass by an abbot and commoign, the defendant made attorney, and

*said by attorney that the monk is his commoign, and not the commoign of the plaintiff*, judgment if he shall be answered, and had the plea by attorney, Quod nota bene. Br. Garrant de Attorney, pl. 46. cites 21 E. 4. 44.

11. In mortdancestor, the defendant by attorney may say *that the demandant is a bastard*. Thel. Dig. 201. lib. 13. cap. 15. f. 13. cites Pasch. 9 H. 5. 6.

12. Where the defendant is supposed to be of one vill, he cannot say by attorney *that he was never abiding at this vill, but at another vill*. Thel. Dig. 201. lib. 13. cap. 15. f. 13. cites Pasch. 9 H. 5. 7. and 8 H. 6. 9. 19 H. 6. 1. 9 E. 4. 30. 48. and 3 H. 6. 16.

13. Attorney may plead *all that enlarges the name of his master, and that stands with the record, but nothing that is contrariant to it*. Br. Garrant de Attorney, pl. 41. cites 2 H. 6. 11.

As in waste against Alice late wife of Thomas Earl of A. the attorney may say that his client is a Countess, not named Countess; for it stands with his warrant. Br. Garrant de Attorney, pl. 41. cites S. C. — Br. Attorney, pl. 3. cites S. C. — Thel. Dig. 201. lib. 13. cap. 15. f. 14. cites 6 H. 7. 4. and 14 H. 6. 18. S. P.

In trespass a man may appear by attorney, and plead *that he is and was &c. an Earl, not named Earl*, judgment of the writ; for this is as much as the warrant contains and more; per Preston and Juyn Ch. J. but *quære* inde, for name of dignity is parcel of his name, and therefore now he is another person, and *it is proved a misnomer*; therefore it seems that he cannot have this plea by attorney, for it is contrary to the warrant. Br. Garrant de Attorney, pl. 19. cites 14 H. 6. 18.

Attorney may say *that his master is a Viscount*, scilicet, a Lord not named Viscount, judgment of the writ, notwithstanding his warrant, for it stands with his warrant. Br. Garrant de Attorney, pl. 26. cites 6 H. 7. 14.

14. And may say *that his master is a Knight, not named Knight*, judgment of the writ. Br. Garrant de Attorney, pl. 41. cites 2 H. 6. 11.

Formoden against J. N. the tenant said that

he was a Knight the day of the writ purchased; Pigot said in this same action, You made attorney by name of J. N. who is elopped; and per Choke, Danby, and Needham, Knight is parcel of his name, therefore he shall not have the plea; but per Littleton and Young he shall have the plea; for it stands with the warrant of attorney. Br. Garrant de Attorney, pl. 34. cites 8 E. 4. 23. — S. P. Thel. Dig. 201. lib. 15. cap. 15. f. 14. cites Trin. 2 H. 4. 11. 39 H. 6. 49. 4 E. 4. 17. and 8 E. 4. 22. [but it should be 23. a. pl. 39.] Quære. And 6 H. 7. 14.

15. But attorney cannot plead that which *diminishes the name of his master*. Br. Attorney, pl. 3. cites 2 H. 6. 11.

[ 312 ] 16. *Guardian of an infant may plead that which is contrary to the record or name*, for he is admitted guardian by the Court; *contra of attorney*, for he is made attorney by the party. Br. Garrant de Attorney, pl. 50. cites 3 H. 6.

Br. Attorney, pl. 6. cites 8 C. — Thel. Dig. 201. lib. 13. cap. 15. f. 15. cites 8 C. — F. N. B. 27. 17. In debt, it was agreed per Cur. that the attorney of the defendant *shall not plead misnomer of the plaintiff, no more than misnomer of his master*, for the name of the one and the other is comprised in his warrant, scilicet, A. B. *ponit loco suo J. S. against M. P.* Br. Misnomer, pl. 5. cites 3 H. 6. 55.

(A) cites Pasch. 41 E. 2. and Mich. 45 E. 2. Fitzh. Attorney, 52. — The defendant should not plead misnomer in abatement by attorney, and such plea might be refused: but the receiving it is no cause of demurrer; per Holt Ch. J. 12 Mod. 273. Hill. 11 W. 3. Cremor v. Wicket.

18. The defendant by attorney cannot plead the *misnomer of the plaintiff*; for in warrant of attorney is comprised the name as weil of the plaintiff as of the defendant, per tot. Cur. Thel. Dig. 201. lib. 13. cap. 15. f. 15. cites 3 H. 6. 56.

19. In action upon the statute of liveries, the defendant made attorney, and was named of C. and therefore he could not say after in proper person that he abode at S. the day of the writ purchased, and always after, and not at C. quod nota. Br. Garrant de Attorney, pl. 13. cites 8 H. 6. 19. per Cur.

20. In debt against J. S. of H. in the county of C. the defendant said by attorney that there is H. in C. and H. in B. and none without addition in the same county, judgment of the writ; and per Cott. J. attorney may plead misnomer of the vill; for it is not parcel of the name of his master, by which the plaintiff replied, that it is the vill of H. in the same county without addition, Prist. Br. Attorney, pl. 83. cites 10 H. 6. 26.

After the statute of additions where the defendant is supposed to be of Dale, he may plead by attorney, that there are two Dales, and not without addition &c. for this is not repugnant to the warrant of attorney. Thel. Dig. 201. lib. 12. cap. 15. f. 12. cites Hill. 8 H. 5. 8. 10 H. 6. 27. 19 H. 6. 36. 35 H. 6. 5. 22 H. 6. 49. 39 H. 6. 49. 18 E. 4. 10. 22 E. 4. 1. per judicium. 21 E. 4. 37. 61. and 5 E. 4. 47. but contra it is said, 9 H. 5. 8. and 10 H. 7. 4. and 2 E. 4. 31. and 2 R. 3. Estoppel. 81.

Debty J. D. 21. It is held that the defendant cannot plead by attorney *no of D. He made attorney, and yet was permitted to plead* such will, nor hamlet, nor lieu conus hors &c. as is supposed by the addition. Thel. Dig. 201. lib. 13. cap. 15. f. 16. cites Pasch. 11 H. 6. 33. and 19 H. 6. 36. that there is a place called D. in the vill of R. in the county aforesaid, absque hoc that there is any will, hamlet, or lieu conus out of the vill and hamlet called D. in the same county, and had the plea; quod mirum, because it seems that it is contrary, and does not stand with. Br. Garrant de Attorney, pl. 14. cites 21 H. 6. 46.

Thel. Dig. 201. lib. 13. 22. Action against J. prior of the monastery of St. Peter W. if the defendant imparles by attorney, there the attorney or his clients shall

*shall not say that the church is founded of St. Peter and Paul, judgment of the writ; for this does not stand with, for the one is contrary to the other, for all is his name.* Br. Garran de Attorney, pl. 42. cites 35 H. 6. 5.

49. cites 15 H. 7. 14.—And in writ against the *Abbot of Sempringham*, he shall not say by attorney that his name by the foundation is *Abbot of the Abbey Beate Mariæ de Sempringham*. Thel. Dig. 201. lib. 13. cap. 15. f. 17. cites Mich. 8 E. 4. 9.

23. *Contra of Over D. and Nether D. for this is only addition and not parcel of the name.* Br. Garran de Attorney, pl. 42. cites 35 H. 6. 5.

cap. 17. f. 17. cites S. C. and 15 H. 7. 14.—S. P. Br. Attorney, pl. Thel. Dig. 7. 14 of the college of St. Stephen's of W. Ibid.

24. *In debt against J. W. of London, the attorney cannot plead that the defendant abides in the Tower of London, which is not parcel of London; judgment of the writ; by the best opinion.* Br. Garran de Attorney, pl. 30. cites 4 E. 4. 17.

[ 313 ] Br. Brief, pl. 347. cites S. C.

25. *Trespas against J. B. of &c. and the warrant was J. B. de parochia de A. posuit loco suo &c. and the attorney pleaded that there are two villis in the same parish M. and N. and he abode at N. and therefore should be named of the vill, and not of the parish, and by four justices the warrant of attorney is no estoppel to him to plead this matter; for it stands with the warrant, and is not contrariant, by which the plaintiff passed over.* Br. Garran de Attorney, pl. 28. cites 5 E. 4. 125.

Thel. Dig. 201. lib. 13. cap. 15. f. 21. cites S. C.—*Debt against J. S. of T. near F. the defendant said by attorney, that the day of*

*the writ purchased he was abiding at T. in F. absque hoc that he ever abode at T. near F. and per tot. Cur. this plea is clearly contrary to his warrant of attorney, by which the attorney obtained day to have his client in person, who came after in person, and said, that he was abiding at T. in F. absque hoc, that he was ever of T. near F. and per Cur. he shall not have this plea; for if there is T. in F. and not T. near F. he may say, that no such villas T. near F. in the same county, by which he said that there is T. in F. and T. near F. and that the day of the writ purchased he was abiding at T. in F. but absque hoc, that he was ever abiding at T. near F. but it was upon obligation; therefore mirror that the obligation had not been estoppel.* Br. Garran de Attorney, pl. 39. cites 21 E. 4. 75.

26. *Entry against the Abbot of S. who said by attorney that it is founded by the name of Abbatis Beate Mariæ de S. and because this plea is contrary to his warrant of attorney, therefore by all the Justices non allocatur, and the defendant agreed to answer.* Br. Garran de Attorney, pl. 33. cites 8 E. 4. 9.

27. *But where his master is named J. S. of D. he may say that there are two D's, and none without addition; for this is addition, and no part of his name as above.* Ibid.

*Debt against J. S. of D. the defendant by attorney said,*

*that there is Over D. and Nether D. in the same county, and none without addition; judgment of the writ; and per Brian the attorney shall not plead his plea; for it is contrary to his warrant; but at last it was agreed that he shall have the plea, for it stands with &c. and is not contrary.* Br. Garran de Attorney, pl. 38. cites 21 E. 4. 37.

28. *But it was said, that by special warrant, as W. S. who is here impleaded by name of J. S. posuit loco suo &c. there he may have the plea; quære inde of misprision of a proper name of baptism.* Br. Garran de Attorney, pl. 33. cites 8 E. 4. 9.

29. *It is said, that attorney who has special warrant shall plead misnomer of his master, in such form, viz. W. S. who is impleaded*

Warrant of attorney by

mayor and  
commonalty  
shall be gene-  
ral accoirg  
to his writ,  
and because  
it is that the  
mayor and  
citizens posuit loco suo, he shall not plead misnomer, per Brian Ch. J. and therefore he shall have in  
such case special warrant of attorney by their very names of incorporation, and then the attorney shall  
plead misnomer, quod fuit concessum, per tot. Cur. Br. Garrant de Attorney, pl. 36. cites 21  
E. 4. 13.

Thel. Dig.  
201. lib. 13.  
cap. 15. f.  
18. cites 9 E.  
4. 25. S. F.

by name of *W. B. po. lo. suo &c.* Thel. Dig. 201. lib. 13. cap. 15. f. 17. cites Mich. 8 E. 4. 9. but says, that such warrant was not admitted per Cur. Mich. 5 E. 4. 108. but says it was granted per tot. Cur. that such special warrant is good, and that such attorney shall plead misnomer &c. Mich. 21 E. 4. 16.

30. In trespass by an abbot, if the defendant by attorney pleads that the abbot was deposed after the last continuance before J. N. this is a good plea for the attorney, and not contrary to his warrant; for his warrant was good once that the defendant posuit loco suo *D. C. against the abbot of M.* Br. Garrant de Attorney, pl. 16. cites 9 E. 4. 29.

31. And he may plead that he is dead. Ibid.

Thel. Dig.  
201. lib. 13.  
cap. 15. f.  
[ 314 ]  
19. cites  
Mich. 9 E.  
4. 33. 42.  
S. C.

32. Dower against a guardian who made attorney the last term, and imparled, and at the day came the attorney, whose warrant was quod *J. B. custos terræ & heredis &c. posuit loco suo &c.* and now the attorney said that at the day of the writ purchased, nor after the defendant was not guardian, judgment of the writ, and was ousted of the plea by award, because it is contrary to the warrant. Br. Garrant de Attorney, pl. 17. cites 9 E. 4. 31.

Thel. Dig.  
201. lib. 13.  
cap. 15. f.  
19. cites  
Mich. 9 E.  
4. 33. 42.

33. And yet it was agreed that by attorney a man shall plead in debt *ne unques executor*, or *ne unques administrer* as executor, inasmuch as the administration there is only the effect of the matter. Ibid.

S. C. —

Br. Garrant de Attorney, pl. 18. cites 9 E. 4. 40. that he may plead such plea, because it is in bar. — Thel. Dig. 201. lib. 13. cap. 15. f. 22. cites 9 E. 4. 42. S. C.

Thel. Dig.  
201. lib. 13.  
cap. 15. f.  
19. cites  
Mich. 9 E.  
4. 33. 42. S. C.

34. And per Choke, in debt against *J. filium & heredem W. B.* if he makes attorney he cannot plead after that he has an elder brother, or that he is a bastard. Ibid.

Thel. Dig.  
201. lib. 13.  
cap. 15. f.  
19. cites  
Mich. 9 E.  
4. 33. 42. S. C. —

35. And in debt against administrators, the attorney cannot say that the administration was not committed to him. Br. Garrant de Attorney, pl. 17. cites 9 E. 4. 31.

4. 33. 42. S. C. —

But in writ by one as administrator, the defendant by attorney may say, that the administration was not committed to the plaintiff. Thel. Dig. 201. lib. 13. cap. 15. f. 13. cites Pasch. 9 H. 5. 6.

36. The tenant shall plead *nontenure* by attorney. Thel. Dig. 201. lib. 13. cap. 15. f. 19. cites Mich. 9 E. 4. 33. 42.

Br. Execu-  
tors, pl. 91.  
cites S. C. —  
Thel.  
Dig. 201. lib.  
13. cap. 15.  
cites 9 E. 4.  
42. S. C.

37. Debt against executors who appeared by attorney, who imparled to another term, and at the day came and said, that he died intestate, and the administration was committed to him by the ordinary; judgment of the writ as executor, and per tot. Cur. he is stopped by the warrant of attorney and the imparlance; for this is in a manner but misnomer. Br. Garrant de Attorney, pl. 18. cites 9 E. 4. 40.

38. In writ against a prior he shall not say by attorney that he is



is *deposed*, unless it be after the last continuance. Thel. Dig. 202. lib. 13. cap. 15. f. 23. cites Mich. 18 E. 4. 20.

39. In quare impedit against several the plaintiff counted, and the defendants *imparied by attorney*, and after *one said* that there is *no such R. S. as one of the defendants the day of the writ purchased, nor ever after*; and by the opinion of the Court, if the *warrant* was *joint*, none of them shall have the plea; but if *several warrants* were sent, then every one shall have the plea, but the attorney who was not in esse; for it is contrary to his warrant. Br. Brief, pl. 384. cites 20 E. 4. 1.

Br. Garrat of Attorney, pl. 35. cites S. C. Thel. Dig. 202. lib. 13. cap. 15. f. 24. cites S. C.

40. An attorney who is informed to plead a matter which he cannot plead by conscience, he may plead that *non est veraciter informatus &c.* and this is sufficient for him in writ of disceit against [brought by] his client. Br. Attorney, pl. 76. cites 20 E. 4. 9.

Jenk. 52. pl. 100. S. P. and that in so doing he does his duty.

41. *Debt against J. W. of C.* The defendant appeared by attorney, and *imparied*, and at the day said there is *East C. and West C. and none without addition, judgment of the writ*; and per tot. Cur. he shall have the plea if it be upon an obligation, because it stands with the warrant. Br. Garrat de Attorney, pl. 43. cites 21 E. 4. 1.

42. *Contra per tot. Cur. if he be named of C. in the obligation*, and the reason seems to be, inasmuch as he shall then be estopped to say that there is no C. without addition. Quod nota. Ibid.

43. In *debt against J. S. of D.* the attorney cannot plead that the defendant the day of the writ purchased was at *F. absque hoc* that he was ever conversant or abiding at *D.* For this is contrary to his warrant; but the defendant himself may plead it well. Br. Garrat de Attorney, pl. 37. cites 21 E. 4. 17.

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44. A man shall not have plea by attorney which is *contrary to the warrant*. Br. Brief, pl. 457. cites 21 E. 4. 75.

45. Attorney may *disclaim in the tenancy* for his master. Thel. Dig. 202. lib. 13. cap. 15. f. 25. cites Pach. 9 H. 7. 24.

Thel. Dig. 201. lib. 13. cap. 15. f. 7. cites 24 Aff.

25. S. P. — In assise of *mortdance* for the attorney of the tenant *disclaimed* for his master. Br. Attorney, pl. 102. cites 22 E. 3. 25.

An attorney may *disclaim* for his master in plea of land; contra of bailiff in assise. Br. Attorney, pl. 71. cites 9 H. 7. 24.

46. An information for an assault and battery was exhibited against *J. Westly, alias Wesley*. The defendant appeared gratis by attorney, and pleaded in abatement that he was the person against whom the information was exhibited, and that his name was *Wesley, absque hoc &c.* The King's attorney demurred. It was objected that *Westly* and *Wesley* were the same name, and idem sonantia, though differently spelt. 2dly, That the defendant could not plead misnomer upon his appearance gratis, and by attorney, but ought to have been brought in by process, and pleaded in proper person that the King's attorney might be satisfied of the identity of the person, and 3 H. 8. 55. was cited to this purpose. But per Cur. *Westly* and *Wesley* are different names, and ought to be pronounced differently, and that a pronunciation of them as the same

same is vicious, and no rule to judge by. It was also held, that if the defendant apprehended himself to be the same person against whom the information is exhibited, he might appear without process, and plead misnomer by attorney, that such a plea lies for the defendant upon a gratis appearance. See 3 E. 4. 15. 21 H. 7. 8. and that it may be by attorney. The law is now settled upon several authorities, and the frequent practice of the Court, and that the *reason why it was not allowed formerly to be by attorney was, because warrants of attorney were general, naming the parties only as they were named in the writ, which warrants being of record, were stoppels to attornies to plead misnomer.* See Br. tit. Garrant de Attorney, and Misnomer. And see 5 E. 4. 108. where the first special warrant appears; and it was held that the King's attorney, by demurring, allowed the defendant to be the same person in the information. MS. Rep. Trin. 4 Geo. B. R. The King v. Westly.

(U) Where several Attornies are for the same Defendant, in what Case they may plead several Pleas.

When a man has 2 attornies who plead severally, that is to say, the one in bar, and the other to the assise,

the plea to the assise shall be taken as if the party himself had so pleaded, and then the general issue waives the bar. *Contra of two guardians for an infant; for there the most beneficial plea shall be taken.* Br. Garrant de Attorney, pl. 31. cites Fitzh. Assise, 120. 20 E. 3.

- [ 316 ] 2. In *formedon* by the Ld. Brook against the Ld. Latimer, the tenant made two several attornies, and the one demanded the view, and had it, and at the day the tenant and the attorney who demanded the view made default, and the other attorney cast *essoign*; and per Yaxley, the *essoign* does not lie; for the tenant has an attorney who is not *essoigned*. But per Cur. the *essoign* cast by the one shall excuse the default of the tenant, and of the other attorney; and per Coningsby, he who will have two attornies in C. B. ought to put in two warrants of attorney; for one warrant conjunctim & divisim is not used there. And per Brian, where a man has two attornies, and the one pleads one plea, and the other another plea, this shall be taken a double plea, and so the demandant may demur, and after the tenant dared not demur, but appeared; and it was said there, that 18 H. 6. 20. and 11 H. 4. 53. and 13 R. 2. the tenant durst not demur in the like case, but appeared as here; so quære. Br. Attorney, pl. 72. cites 12 H. 7. 8.

(W) What

(W) What may be done by Attorney.

1. *Stat. Merton, cap. 10. 20 H. 3.* ENACTS, That every freeman that owes suit to the county, tithing, hundred, or wapentake, or court baron may take attorney to do his suit for him.

The suitor must make a letter of attorney under his seal.

This statute extends not to suit real. 2 Inst. 99. 2 Inst. 100.

2. One may do that himself which he cannot do by attorney, as the lord may beat his villein, but a stranger cannot do it for the lord; and the lord may distrain for rent when it is not behind, and the tenant shall not have trespass; but if the bailiff distrain when no rent is arrear, trespass lies against him. Arg. Godb. 387. cites 2 H. 4. 4. 9 H. 7. 14.

9 Rep. 76. b. S. P. and cites S. C. and also 11 H. 4. 78. b. 1 H. 6. 6. a. 33 E. 3. Trespass 253.

3. *Proviso* reserved to the feoffor, to make leases for 3 lives or 21 years, he cannot do it by attorney, because he has but a particular power which is personal to him. 9 Rep. 76. in Comb's Case, cites it as resolved by Wray and Anderson Ch. J. at Suffolk Assises, 24 Eliz.

Because it is not a lease of the land, but a declaration of the first use, and the lessee comes in

upon original agreement, upon the first feoffment; per Jones J. Palm. 436. in Case of Hardwin v. Warner, cites Comb's Case, and 8 Rep. Whitlock's Case.

4. There are some things *personal*, and so inseparably incident, that they cannot be done by attorney, as doing of *homage* and *fealty*. 9 Rep. 76. Trin. 11 Jac. in Comb's Case.

2 Roll. Rep. 393. cites S. C. & S. P.

5. At common law a man might levy a fine by attorney, as well as confess an action, and the attorney himself might enter and record it, though the party did not make consuance, and of this great mischief followed, and oftentimes disherison, and therefore it was ordained by the statute *de finibus & attorn.* that a fine shall not be levied before that the parties went before the justices in proper person, so that the justices may have consuances of their age, and other defaults; yet at this day a man may take estate by fine by attorney, also a man may take a grant, and render by fine by attorney, as in proper person. Densh. R. of Fines 7.

6. And the baron and feme may take estate by fine by attorney made by the baron; but this shall not bind the lord to claim other estate after the coverture dissolves. Densh. R. of Fines 7.

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7. But mayor and commonalty, dean and chapter, *recluse* and the like cannot levy a fine, nor take any estate by fine by attorney. Densh. R. of Fines 17.

8. Errors on a judgment in Ireland, were allowed by the Court to be assigned here by attorney. 11 Mod. 257. pl. 11. Mich. 8 Ann. B. R. Anon.

Mr. Harcourt, Clerk of the Crown, said it had been

done in the Case of York v. Medley.

For more of Attorney in General, see Infant, Guardian, Privilege, and other proper Titles.

Attorn-

This head of Attornment being now become of very little use, and a long title, I have chose to leave out both the text of Roll and the many notes thereupon, and shall only add what follows.

## Attornment.

1. **ATTORNMENT** is the consent of the tenant to the grant of the seigniori or the reversion, putting him into the possession of services due from such tenant. *The reasons are threefold, 1st, From the ancient feudal law, when the seignories subsisted in their ancient clans they used to be continually contending with each other, and it was frequent in those times to make peace upon amicable concessions to each other; but if upon such grants they should have subjected any feudaries to the other lord, it might have been to the infinite prejudice of such tenants; for though such contending lords might agree, yet the grudge might continue to the tenants, and therefore the policy of that old law was, that their fealty was not to be carried over to any other without their consent, from whom they might expect oppression rather than protection. 2dly, That the tenants might know to whom the rents and services were due, and to distinguish the lawful distress from the tortious taking of his cattle; and this reason was so prevalent, that when the law gave a free alienation in respect of the superior lord, yet the tenant's right of attornment continued unaltered. 3dly, That by the tenant's lawful payment to the grantee of such seigniori or reversion, he might be put into possession of such seigniori or reversion; and that by the payment of such rents, and doing such services, which anciently lay in going to the wars with their lords, and plowing their grounds, all men might know in whom such rights were vested; and here the most general rule is, that the tenant cannot alter the grant, but only attorn to it, and by such attornment can make no variation in the grant itself; for the tenant has no right to the reversion, and therefore cannot alter the disposition of it one way or the other, but he has right to the possession, and therefore can put whom he pleases into that possession which he has in him. Gilb. Treat. of Ten. 75, 76.*

2. 4 Ann. cap. 16. s. 9. *All grants or conveyances, or otherwise of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good without attornment of the tenants.*

3. 8. 10. *Provided that no such tenant be damaged by payment of rent to any such grantor or conuor, or by breach of any condition for non-payment of rent, before notice given him of such grant by the conusee or grantee.*

[ 318 ] 4. 11 Geo. 2. cap. 19. s. 11. *Attornment of tenants to strangers, claiming title to the estate of their landlords, shall be absolutely null and void to all intents and purposes whatsoever, and the possession of their respective landlord or landlords, lessor or lessors, shall not be deemed or construed to be any wise changed, altered, or affected, by any such attornment or attornments, provided always that nothing herein contained shall extend to vacate or affect any attornment made pursuant to, and in consequence of some judgment at law, or decree, or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee, after the mortgage is become forfeited.*

## \* Audita Querela.

Fol. 304.

### (A) In what Cases a Thing may be *avoided without* an Audita Querela.

[1. IF a man leases for years [to B.] reserving a rent, and after acknowledges one statute to J. S. and another statute to J. D. and after J. S. accepts a lease for years of the reversion [and rent reserved on lease to B.] of the *conuſor*, and then J. D. who hath the puisne statute extends the reversion and rent; and after J. S. extends it also upon his statute, and for the rent arere brings an action of debt against [B.] the lessee; [B.] the lessee without an audita querela may avoid his extent by pleading that his statute was suspended by acceptance of the lease of the reversion. Pasch. 16 Jac. B. R. between Sir J. Harrington and Garroway, adjudged upon a special verdict.]

\* An audita querela is an equitable action, upon which the law does not look with so strict an eye as upon other actions. Mar. 71. by Barkley J. Cro. J. 424. pl. 9. Pasch. 15. Jac. B. R. the S. C. adjudged accordingly, and there was no audita querela.

—Cro. J. 477. pl. 11. Pasch. 16 Jac. B. R. the S. C. and it was moved that if there were cause to avoid the extent, an audita querela ought to have been brought to avoid it; for that the first *conuſee* is in by matter of record, and that a statute being of record cannot be avoided but by matter of fact; sed non allocatur; for when the plaintiff [the 2d *conuſee*] had once lawfully extended, and the land delivered him in extent, he may by plea in this action avoid the extent upon the former statute, and shall not be put to an audita querela; for the 2d extent never was lawful, but was suspended by taking the lease, and then the plaintiff having well extended, may well maintain this action, and judgment accordingly. —Cro. J. 569. pl. 9. Pasch. 18 Jac. in Cam. Scacc. Garroway v. Harrington, S. C. and judgment was reversed for uncertainty in the declaration; but as to the matter in law no opinion was delivered. —Palm. 272. Hill. 19 Jac. S. C. which see at tit. Statute Merchant, (L) pl. 1. and the notes there.

[2. If a *disseisor* acknowledges a statute, and after the *disseisee* enters, and the *conuſee* extends the statute, the *disseisee* without an audita querela may avoid it, because there is no right of an extent. Pasch. 16 Jac. B. R. in Sir J. Harrington and Garroway's Case, per Houghton.]

Cro. J. 425. 477. & 569. S. C. but S. P. does not appear. —Palm. 272. S. C. but I do not observe S. P.

[3. If tenant in tail acknowledges a statute and dies, and the *conuſee* sues execution against the issue, the issue may avoid it in an *assise* without any audita querela. 18 Ed. 3. *Assise* 77. adjudged.]

Br. Audita Querela, pl. 17. cites 38 Aff. 5. —Infra pl. 9. S. P. and see pl. 10.

[4. If a writ comes to the *sheriff* to deliver to J. S. the *conuſee* of a statute, all the lands of T. S. the *conuſor*, which he had the day of the statute made, or after, and the *sheriff* by force thereof, delivers to him the land of a stranger not subject to the extent, the stranger shall not have an audita querela, but he may avoid it in

[ 319 ] S. C. cited by Windham, J. Sid. 55. pl. 22. —Raym.

20. Windham J. cited S. C.— *an assize*; for the sheriff had no colour to deliver this land. 6 R. 2. Assize 69. Audita Querela 6.]  
See pl. 11. S. C. & S. P.

Hob. 47. [5. If *A. recovers against B. debt or damages*, and thereupon an *elegit* is granted to the sheriff to extend the moiety of all the land of *B.* and thereupon the sheriff delivers the moiety of the land of *B.* which is *ancient demesne*; tho' it be admitted that this is *not extendible*, yet *B. cannot avoid it by entry*, without an *audita querela*, because the sheriff had a warrant to deliver the moiety of all his land, and this was his land, ergo not void; Hobart's Reports, 66. between *Coke and Barneby*.]

the way to do it would be by *audita querela*, because there was no time to plead it before. — Brownl. 234. *Coke v. Barnley*, S. C. but S. P. does not exactly appear. — S. C. cited Mo. 212. pl. 351. but S. P. does not appear; but says it was adjudged by all the justices, that land in ancient demesne is extendible.

Cro E. 310. [6. If a man sues an *elegit* for a debt recovered, and hath certain lands in extent upon the *elegit*, and after he suggests that the recoverer hath other lands in the county, and thereupon hath a new *elegit*, and upon this the other land is extended; this last extent, at the most, is *but voidable by error*, and not void. Mich. 37 El. B. R. between *Hanger and Frie* adjudged, which intratur Hill. 35. El. Rot. 246.]

livery, and accepted it, he cannot afterwards take a new extent, and if he does, it is wholly void, and not only voidable or erroneous; for then the record is ended, the attornies of both parts are out of Court, and it is as a writ without original, which is wholly void; but here it is found *super quo* he came and prayed a new extent, which shall be intended the first day of the extent returned, and then it is reason that he may waive it, and take a new extent; and adjudged that the new extent was good. — Mo. 341. pl. 462. *Hunger v. Fry*, S. C. Upon the first *elegit* land was delivered in extent, and upon suggestion of more lands in the same county a lease for years was taken in execution, and sold; and adjudged that the sale was good. — 12 Mod. 367. Arg. cites Mo. 341. and Cro. E. 310. but seems to mistake what is mentioned in Cro. E. as said in Mo.

Cro. C. [7. If *A. acknowledges a recognizance in nature of a statute staple* to *B.* and after *B. dies*, and *C. his executor* sues an extent out of Chancery, and before this is executed *C. dies*, and after administration of the goods of *B. not administered by C. is granted to D.* and after, and before the return day of the writ of execution, the writ is executed, and the land of *A. extended*, and seised into the king's hands, according to the command of the writ; and after *D. sues* a writ *liberate*, and thereupon the land is delivered to him in extent, this is all void without suing any *audita* (\*) *querela*; for by the death of *C. the executor*, before the inquisition taken, the writ of extent was *de facto abated*, in as much as it was the writ of *C.* the writ commanding the sheriff to extend and seise into the king's hands, ut ea præfato executori quousque &c. liberari faciat &c. and then this which was done upon this foundation was all void, the administrator not being privy thereto, but coming in paramount thereto. P. 11 Car. B. R. between *Vere and Cleve*, per totam Curiam, præter *Coke*, who seemed e contra, adjudged upon a solemn argument upon a special verdict, intratur. Tr. 11 Car. Rot. 1378.]

\* Fol. 505.  
void; but Crooke e contra, & adjournatur. — Ibid. 457. pl. 3. Pasch. 12 Car. B. R. S. C. adjudged accordingly by Jones and Baskelley for the plaintiff; and Brampton Ch. J. (then absent) delivered his opinion to Jones J. to be

be the same; but Crooke J. retained his former opinion.——Jo. 385. pl. 1. S. C. ad- [ 320 ]  
judged accordingly by Jones and Berkley, and that Brampton was of the same opinion;  
but Crooke e contra; and says that Saunders, an old clerk of the Petty Bag, and of great experience  
as to extents, certified his opinion in writing, that the extent made after the death of the executor,  
and the liberate after to the administrators were void; and that the administrator ought to have  
had an extent de novo, and a new liberate thereupon.

[8. If upon an elegit the sheriff takes an inquisition, and there are  
several lands found subject to the extent, and several values found,  
and the sheriff returns, that he has delivered some of the lands in  
particular for the moiety, where it appears according to the va-  
lues found, that an equal moiety is not delivered to the party  
who recovered, but more than a moiety, yet this is not void, nor  
is it a disseisin by the entry, but only avoidable by audita querela.  
Trin. 15 Car. B. R. between Rowe and Weekes, per Curiam ad-  
judged upon demurrer.

12 Mod.  
365. Arg.  
cites S. C.  
and says, it  
must be in-  
tended that  
the plaintiff  
had entered  
by virtue of  
the extent,  
because it  
says the  
plaintiff's

entry was no disseisin, and it might be that after actual entry the defendant is put to audita  
querela, and that if it had appeared to the Court only by affidavits that more than a moiety  
was extended, it would be hard to relieve even upon an audita querela, because of the danger of  
avoiding a record by affidavits, and that this case is not found in any other book; and adjudged *ibid.*  
368. Pasch. 12 W. 3. that where on the return it appears that more than a moiety is delivered, it is  
absolutely void, and needs no judgment or audita querela to avoid it.

Inquisition found 20 acres where in truth there were but 10, and the whole 10 were delivered in  
extent. The Court said, this could not be tried in ejectment by a special issue, but the party grieved  
may file a declaration, and the general issue shall be taken, and if upon the evidence it appears  
that more than a moiety is delivered, the extent is void. Sid. 239. pl. 11. Hill. 16 & 17 Car. 2.  
B. R. Stamford (Earl) v. Hobart.——*Ibid.* is added a nota, that Hill. 23 & 24 Car. 2. B. R.  
Hale Ch. J. declared his opinion, that such extent of more than a moiety is not void, nor can be  
avoided after such extent filed.——12 Mod. 355. Arg. cites the above opinion of Hale.

\* Lev. 160. Hill. 16 and 17 Car. 2. B. R. Stamford (Earl) v. Nedham, S. P. and seems to be S.  
C. says, that the Court held that it might be avoided in evidence in ejectment brought for the lands.

[9. If tenant in tail acknowledges a statute and dies, and the  
conusee sues execution against the issue, the issue may have an assise,  
and therein avoid the statute, and is not put to his audita que-  
rela. Mich. 3 Jac. B. R. \* 10 between Albburnham and St. John  
agreed.]

Cro. J. 85.  
pl. 10. S. C.  
——Seq.  
tit. Heir.  
(B) pl. 4.  
Day v.  
Guildford.

\* This seems to be the same as pl. 10. in Cro. J. S. C.

[10. But in this case, the issue at his election may have an audita  
querela if he will. Mich. 3 Jac. B. R. between Albburnham and  
St. John adjudged per admittance.]

Cro. J. 85.  
pl. 10. S. C.

[11. Upon a writ of extent upon a statute, if the sheriff deli-  
vers in extent the land of a stranger, the stranger may have an  
assise, and is not put to an audita querela. 6 R. 2. Aff. 69.  
adjudged, and there an audita querela brought in this case  
was abated by judgment.]

[12. If an infant acknowledges a recognizance, statute merchant,  
or staple, or recognizance in nature of a statute staple, he can-  
not avoid this without an audita querela brought before his full age,  
because his nonage ought to be tried by inspection. Co. Magna  
Charta 673.]

F. N. B.  
104. (K)  
S. P. contra  
that he may  
have it after  
his full age.  
——D. 232.

b. pl. 9. Mich. 6 & 7 Eliz. Harrison v. Worley held by divers that it ought to be brought within age  
——And. 25. pl. 54. S. C. held accordingly, and says, that in the register the form of the writ  
is to allege that he is yet within age, notwithstanding F. N. B. 104. seems to the contrary.——  
Bendl. 80. pl. 123. Pasch. 2 Eliz. S. C. according to Dyer and Anderson.——Mo. 75. pl.

206. Worley's Case, S. C. and it was agreed by all, that the writ should abate. But Weston said, that tho' so it is where he comes to full age before inspection, yet if he was once adjudged within age, then the statute shall be avoided by it. — 2 And. 158. pl. 87. Arg. S. P. accordingly. — S. P. by the Ch. J. Arg. 10. Rep. 43. a. Trin. 11 Jac.

[ 321 ] [13. But if an infant bargains and sells lands by deed inrolled according to 27 H. 8. he may avoid it when he will, without an audita querela, because this is real. Co. Magna Charta 673.]

a Inst. 673.

—Mo. 77.

same diver-

sity between recognizance, statute, or fine, and deed inrolled; for in the last case nothing passed by the inrollment but all by the deed before; per Brown and Weston. — Kelw. 10. a. b. S. P. per Keble.

Br. Error,  
pl. 134. cites  
S. C.

[14. If a judgment be given in an inferior court against B. and a writ of error is brought thereupon at Westminster, and there the judgment is reversed for error, and upon the record it appears that J. S. was pledge for B. in the base-court for the debt, a special writ may be awarded to deliver him. 1 H. 7. 12. b.]

15. Note a diversity where the discharge comes by determination of the estate: there the conusor needs no audita querela; for if tenant in tail acknowledges a statute which is extended, and he dies, his issue may avoid it by entry. F. N. B. 102. (H) in the new notes there (a) cites 38 Ass. 5. 43 Ass. 18.

16. A. entered into a usurious bond, whereupon debt being afterwards brought, he made an attorney and appeared, but was condemned upon a nihil dicit, and taken in execution; afterwards he brought audita querela, but it was disallowed by the whole Court; for it lies not after judgment upon a thing he might have pleaded before. Cro. E. 25. pl. 3. Pasch. 26 Eliz. B. R. Fisher v. Banks.

17. Debtor after judgment sold the lands, and being unable to pay the money, the judgment creditor brought a scire facias against him, and had judgment therein by default, and by an elegit extended the lands of the purchaser; but the whole being not extended, the purchaser had no remedy but by an audita querela. Brownl. 39. Joules v. Joules.

18. If an infant makes an obligation, and being sued an attorney without warrant suffers judgment by non sum informatus, this is no cause to grant an audita querela; for he shall have error if he was within age, and if not, then he shall have writ of disceit against the attorney. Win. 114. Mich. 21 Jac. C. B. Ashley v. Collins.

19. If there be a judgment against 3, and one of them is taken in execution, and afterwards let at large by the plaintiff's consent, if any of the other two be afterwards taken in execution upon the same judgment, he may have an audita querela; but he cannot be relieved on a motion in Court, tho' grounded on an affidavit; per Roll Ch. J. Sty. 387. Mich. 1653. in Case of Price v. Goodrick.

20. Where the party has a matter which he might have pleaded to the scire facias in his discharge, and two nibils are returned, and judgment against him, the Court will relieve him upon motion, without putting him to an audita querela; otherwise if a scire feci be returned. 1 Salk. 93. pl. 4. Pasch. 12 W. 3. B. R. Anon.



(B) At what *Time* it lies.

[1. A Stranger to the *statute*, who is a *purchaser* of the land, shall not have an audita querela *before execution* against him. \* 17 Ed. 3. 43. contra 25 Ed. 3. 37. per Hill.]

\* Fitzh. Audita Querela, pl. 21. cites S. C. — S. C. cited

in a nota of the reporter. 3 Rep. 13. b. — S. P. by Haughton J. Cro. J. 507. pl. 19. Arg. cites 17 Aff. & 17 E. 3. 29. and that being warned if he does not plead that another is tertenant who ought also to be charged, he never after shall have an audita querela. — 2 Bulst. 17. Arg. cites S. C. [ 322 ]

[2. If one man acknowledges a *statute merchant* to another, who after *releases* it, and the *conusor* *aliens* his land to a *stranger*, the stranger shall not have an audita querela against the *conussee*, *before* he hath *sued execution* against him; for perhaps he is not tenant of the land, and then he shall hinder execution against another. 17. Ed. 3. 27. b. adjudged.]

Fitzh. Audita Querela, pl. 21. cites S. C.

[3. So the *feoffee* of part of the land shall not have an audita querela *before execution* sued against him, *though the conussee hath sued execution of the residue* against the *conusor*. 17. Ed. 3. 27. b. adjudged.]

Fitz. Audita Querela, pl. 21. cites S. C. — He shall not have it till

his lands are in execution. F. N. B. 104. (G) — Feoffee shall not have aud. quer. till after execution. 2 Bulst. 17 Arg.

[4. But if he hath *sued execution* of part of the land in the hands of the *feoffee*, tho' not of all, he shall have an audita querela presently. 17. Ed. 3. 28.]

Fol. 306.

[5. If the *conusor* being *lessee for life*, upon an execution awarded against him *be returned dead* by the sheriff, he in the remainder, who is not subject to the extent, shall not have an audita querela *before execution* prayed against him. 18 Ed. 3. 26. b.]

Fitzh. Audita Querela, pl. 21. cites S. C.

[6. The *conusor* of a *statute* shall have an audita querela *before execution* sued. 17 Ed. 3. 43.]

Fitzh. Audita Querela, pl. 8. cites

S. C. — An audita querela, quia timet, may be maintained before any execution sued. Co. Litt. 100. a. — 3 Rep. 13. b. S. C. and S. P. cited in a nota of the reporter. — S. C. cited Arg. 1. Bulst. 17. — S. P. agreed Win. 23. Mich. 19 Jac. in Case of Grubham v. Cooke.

[7. So his heir shall have it *before execution* sued. 17 Ed. 3. 43. adjudged.]

Fitzh. Audita Querela, pl. 8. cites

S. C. — S. C. cited in a nota of the reporter, 3 Rep. 13. b.

[8. The *conusor* or his heir shall have an audita querela *before* that the *suit* upon the *statute* is commenced. 17. Ed. 3. 43.]

Fitz. Audita Querela, pl. 8. cites S. C.

[9. If the *conusor* of a *statute* *sues execution*, the *conusor* shall have an audita querela *after the day of the return*, altho' the writ be not returned, if he ayers that execution is done. 39 Ed. 3. 30. b. adjudged.]

[10. If in *trespass* it be found for the plaintiff by nisi prius, and after, *before the day in Bank* he releases to the defendant, the defendant before judgment shall not have an audita querela upon this

Br. Audita Querela, pl. 10. cites S. C. and by

Cott. Halls, release; for perhaps he will not have judgment thereupon. 9 and Hank. H. 5. 1.]  
he shall never have

aud. quer. before judgment, but Paston e contra; and Brooke says, that ex hoc videtur that he shall not plead it; and also that he shall have jud. quer. after judgment to prevent execution.——Fitzh. Aud. Quer. pl. 13. cites S. C.——S. C. cited and agreed per Cur. whereupon it was urged, that then it would be impossible for them to bring an aud. quer. before they are taken in execution, for that the plaintiff will get judgment signed, and take out execution on a suddain, and behind the defendant's back; whereupon the poſtea was ordered to be brought in, to see if execution were signed; and Hale Ch. J. at another day said, that if an aud. quer. was brought after the day in Bank, tho' the judgment was not entered up, yet the Court would make them enter it up as of that day; so that they shall not plead nul tiel record. 1 Mod. 111. pl. 5. Trin. 26 Car. 2. B. R. Lampiere v. Mereday.——3 Keb. 291. pl. 14. Lauſier v. Mereday, S. C.

Br. Audita Querela, pl. [11. A writ of execution, with an *extendi facias*, issues upon a statute merchant, and the writ is *not returned*, the conuſor shall [ 323 ] have an audita querela, upon a *ſurmise that the term is incurred*, 26. cites S. notwithstanding the writ was not returned. 39 Ed. 3. 30.]

C. and ſays that the conuſor ſaid *that execution was \* not made*, and prayed ven. fac. upon audita querela, and it was granted notwithstanding the writ was not returned. Br. Audita Querela, pl. 26. cites 39 E. 3. 30.

[\* This word (not) is in all the editions of Br. but it ſeems it ſhould be omitted. and it is not in the year book, and the words in Roll (that the term is incurred) intend that the execution was made before.

12. A man condemned in 100l. in execution pleaded *acquittance after the laſt continuance*, and it was ſaid that he ſhall have *ſcire facias in the ſame term, and audita querela in another term*, and after he found ſurceties to go at large. Br. Audita Querela, pl. 28. cites 21 H. 7. 30.

### (C) In what *Cafe*. At what *Time*.

\* Br. Audita Querela, pl. 12. cites S. C. [1. **WHERE** the party might have pleaded the *diſcharge, and hath ſurceaſed his time*, he ſhall never be held by audita querela. \* 48 Ed. 3. 20. Tr. 3 Ja. B. R. between + Randall and Ognell, admitted.]

pl. 7. Ognell v. Randol, S. C. but S. P. does not appear.——S. P. held per Cur. accordingly, becauſe it was his laches that he did not take advantage of it by way of plea. Godb. 257. pl. 355. Paſch. 12 Jac. B. R. Cowley v. Legat.——And to relieve afterwards is againſt the rules of law. Arg. 2 Sid. 109. 2nd ibid. 113. judgment accordingly. Mich. 1658. B. R. Robinſon v. Banbrough.——S. P. accordingly by Bridgman Ch. J. Sid. 43. pl. 1. Trin. 13 Car. 2. C. B.

Br. Audita Querela, pl. 12. cites S. C. [2. If upon a *ſcire facias upon a recognizance the party is returned warned*, and he makes default, he ſhall never after avoid it by audita querela, becauſe this recognizance was upon condition, which he hath performed, or for other matter, becauſe he had day to answer. \* 48 Ed. 3. 20. 21 Ed. 3. 13. b.]

Br. Audita Querela, pl. 12. cites S. C. & S. P. [3. But after a *ſieri facias*, or *elegit*, an audita querela lies in the *Cafe aforeſaid*, becauſe he had no day to answer. 48 Ed. 3. 20.]  
——If the plaintiff takes out a new *ſcire facias within the year*, *querre* if the defendant ſhall not have an audita querela. Gouldib. 171. pl. 101. Hill. 43 Eliz. in *Cafe of Fox v. Bailton*.

[4. If upon a *scire facias* to have execution of damages recovered, the defendant is returned warned, and he does not come, he shall never avoid it by audita querela, for that the plaintiff hath released; because if he was warned he hath surceased his time; and if he was not warned he hath his remedy against the sheriff. 21 Ed. 3. 13. b. Hobart's Reports, Case 361. in *Hanner and Mof's Case*.]

he was warned he might have pleaded the release upon the return of the *scire facias*.—S. P. per Frowike. Kelw. 23. b. 24. a. Pasch. 12. H. 7. —S. P. ibid. 25. a. per Vavifor, in S. C. —S. P. held accordingly per Cur. obiter Cro. E. 4. pl. 2. Pasch. 24. Eliz. B. R. in Marshall's Case. —A man recovered in writ of annuity, and after released to the defendant, and then sued *scire facias*, and the defendant brought audita querela, and had *venire facias returnabile* Ocfabius Hill. If the plaintiff in the audita querela does not come at the day, but the other comes, there by some the party, who was condemned, has lost the advantage of the deed for ever. Br. Audita Querela, pl. 22. cites 24 E. 3. 44.

[5. But in a *scire facias* to have execution of damages recovered, or of a recognizance, if upon a return of the sheriff that he hath nothing by which he may be summoned, execution be granted, yet an audita querela lies upon the release of the plaintiff made before; for upon the return he had no day in Court to plead it, and there is no default in the sheriff, upon which he may have his remedy against him. \* 21 Ed. 3. 13. b. adjudged. † 48. b. 27 E. 3. 82. b.]

but S. P. does not appear.—When one is condemned by default, and had no day in Court to plead in his discharge, audita querela lies. Cro. Eliz. 25. pl. 3. Pasch. 26. Eliz. B. R. per Cur. obiter, in the Case of Fisher v. Banks.

If execution upon *scire facias* be taken by default upon 2 *nihilis* returned, if the returns are false the party may have an audita querela. Cro. C. 128. by Crooke J. S. P. by Roll. Ch. J. Sty. 372. Trin. 1653. —S. P. Hob. 283. pl. 362. in Case of Hanner v. Mafe.

[6. If the *conusee* makes an agreement with the *conusor*, and delivers to him the statute in lieu of an acquittance, and after gets the statute and extends the (\*) land, and thereupon the *conusor* prays a re-extent, because it is extended too low, and this is granted, and the land re-extended to deliver to the *conusee*, the *conusor* shall not have an audita querela upon this matter afterwards, because this is contrary to his prayer before to have it re-extended, by which he admits it extendible. Dubitatur 43 Aff. 18.]

[7. If execution be sued upon a statute-merchant or staple, an audita querela lies upon the release of the plaintiff before, because he had no day in Court before to plead it. 21 Ed. 3. 13. b.]

[8. In *trespass* or other action, if it be found for the plaintiff by *nisi prius*, and after, before the day in Bank, the plaintiff releases to the defendant, and after judgment is given for the plaintiff, the defendant shall have an audita querela upon this matter, because he could not plead the release at the day in Bank. 6 R. 2. Audita Querela 7.]

ment and sues execution thereupon. F. N. B. 104. (A) and ibid. in the new notes there (a) gives the same reason that he cannot plead it at the day in Bank, and adds, that before judgment he cannot have an audita querela to stay judgment. 9 H. 5. 1. —A. recovers the arrears of rent against B. at a *nisi prius*, but before the day in Bank A. releases to B. all demands; Hubbard said, that if it had been in the Case of the king, the defendant at the day in Bank might have pleaded that, for he cannot have an audita querela against the king; but otherwise in case of a common person. Noy. 26. Mich. 15 Jac. C. B. Ford v. Mead.

In *ejectment* after verdict at the *nisi prius* for the plaintiff, the defendant at the day in Banco pleaded a release of the plaintiff *mesne betwixt the verdict and day in Banco*. Resolved, he had not day to plead it, nor had he any remedy, if the plaintiff sued execution, but *audita querela*. Cro. J. 646. pl. 10. Trin. 20 Jac. B. R. Stamp v. Parker. — If a release be made to the defendant *between verdict and judgment*, he cannot plead it because he has *no day in Court*, but must help himself by *audita querela*; per Hobart Ch. J. Hob. 162.

Note, it is necessary that he bring it *subile under age*; but he shall

9. If an infant binds himself in a statute-merchant or staple, he shall have an *audita querela* during his nonage to avoid it, and afterwards he shall have an *audita querela* after his full age to avoid it upon that matter in fact. F. N. B. 104. (K.)

not avoid it by plea, saying that he was within age generally. Ibid. in the new notes there (a) cites 17 E. 3. 76. Dy. 132. 13 E. 3. aud. quer. 26, 27. 18 E. 3. 5. 29. 6 E. 3. 29. and says, see Kelw. 17. per Keeb. Quere. 26. & 6 El. C. B. Harrison v. Worley; judgment reversed, durante minoritate.

Aud. quer. lies for an infant who entered into a statute merchant or staple during his nonage, if he be yet within age. F. N. B. 105. (D) says it appears in the register.

10. If there are two *tertenants*, and one of them only is warned, if he does not plead that there is another *tertenant* who ought also to be charged, he never after shall have an aud. quer. Per Haughton J. Cro. J. 507. pl. 19. cites 17 Aff. & 17 E. 3. 29.

[ 325 ] 11. If both plaintiff and defendant make default at the *scire facias*, yet aud. quer. lies on a release made before; contra if the defendant makes default, and the plaintiff appears. F. N. B. (I) in the new notes there (b) cites 21 E. 3. 48. and 24 E. 3. 24.

12. If a man be in execution in C. B. upon a statute-merchant, and has *audita querela*, and after is in execution in B. R. upon the same statute, by which the record of C. B. is removed there, therefore he shall have a new *audita querela*; for that which was of record in C. B. is not of record in B. R. Br. Audita Querela, pl. 42. cites 29 Aff. 41.

13. If at the *pluries in replevin* the sheriff does nothing, by which process of contempt issues against him, and to make replevin, but not to attach the defendant, by which he returns *averia elongata*, wherefore *withernam* issues, and at the day the plaintiff will not make any plea, the defendant shall have *audita querela*; for he cannot have *retorno habendo*, because he has no day in Court; per Holt. Quere. Br. Audita Querela, pl. 43. cites 44 Aff. 15.

14. A man bails his goods to W. N. and a stranger takes them, every one of them, viz. the bailiff and the owner, shall have *trespass or detainue*, and if the one recovers, he shall have *audita querela* against the other who sued before. Br. Audita Querela, pl. 32. cites 5 H. 7. 15.

15. A man who was in execution for damages recovered in *trespass* brought *audita querela* upon release of the plaintiff, and admitted that it lay well. Br. Audita Querela, pl. 35.

16. If a man has arbitrement to plead *mesne between verdict at the nisi prius and the day in Bank*, he cannot plead it; for he has no day in Court to plead after verdict, but he shall have *audita querela*; but in the case of the king he may plead it; for *audita querela* does not lie against the king, nor other action. Br. Audita Querela, pl. 45. cites 21 H. 7. 23.

17. After

17. After *abatement of the writ by variance* between the aud. quer. and the record, there in a new aud. quer. sued according to the record, he shall have a *superfedeas* to stay execution &c. tho' he had a *superfedeas* before in the other aud. quer. which was abated. F. N. B. 104. (R)

18. An *infant acknowledges a recognizance upon inspection*; upon an audita querela he is *judged within age*, and has a *scire facias* against the *conusee*; and upon 1 nihil returned it is judged that the recognizance shall be discharged, whereas 2 nihil ought to be returned, or a *scire feci*, and therefore this judgment was reversed by a writ of error, and the *infant now is of full age*, and he cannot have a new audita querela, yet he shall have a *special writ reciting the whole matter*, and so shall be relieved. Altho' judgment be reversed, the depositions of the witnesses remain. Jenk. 322. pl. 30.

Cro. J. 59. pl. 5. Hill. 2 Jac. B. R. Randal v. Wale, S. C. and judgment reversed accordingly. — Noy. 16. Randall v. Wall, S. C. and there another error

was assigned, because a *scire facias* was awarded where it ought to have been a *venire facias*, and that for those errors judgment was reversed; and that upon his bringing a new audita querela in B. R. after his coming to full age, which happened pending the writ of error; the Court held, that he could not have an aud. quer. again upon the first inspection; for the judges ought to judge upon their own inspection, but at that time no judgment was given or entered. — Yelv. 88. S. C. adjudged that the 2d aud. quer. does not lie; for the judgment of the reversal is general, and not for any special cause, but that the party shall be restored to all that which he lost by the first judgment, and so the recognizance set on foot again. Besides, the judgment of inspection, tho' it be only an award, yet it is of no force but only in the same Court where the proof per testes and the inspection was; and this does not conclude the judges of B. R. but that they ought to have a re-inspection, which cannot be in this case, because the plaintiff is now of full age; and further, if in this case the plaintiff being within age had brought a new aud. quer. in C. B. he ought to have been inspected de novo, because it is a new original, and all the former proceedings are dissolved by the reversal of the judgment. Quod nota.

19. In an audita querela it was resolved by the Court, that if *debt be brought upon an obligation, and issue (upon nihil debet) is found for the plaintiff*, now the defendant shall not have an audita querela upon a *surmise that it was a usurious contract*, for he might have pleaded that in the action of debt. Noy. 123. Cook v. Wall. [ 326 ]

### (D) In what Cases it lies.

[1. IF the *conusee* of a statute *sues execution before the day given by the defeasance* for the performance of the condition, altho' the condition be after broke, yet an audita querela lies, because he shall avoid it, for he has extended the land before his time, and so it is a prejudice to the *conusor*. 46 Ed. 3. 27. b.]

Br. Audita Querela. pl. 24. cites S. C. and says, judgment was prayed of the writ, & adjournatur.

[2. If a man *recovers a debt, and before execution releases to the recoverer, and after sues such an execution, in which the release is not pleadable*, an audita querela lies. 7 H. 6. 7.]

Where execution is erroneously sued against any matter

of discharge, the party may have audita querela. Mo. 433. in Case of Hobbs v. Tadcastle,

[3. But it had been *otherways* if the release had been after execution. 7 H. 6. 7.]

[4. If A, be in execution at the suit of B. and after A. *escapes with*

\* See tit. Execution,

(U. a) pl. 8. *with the consent of the sheriff, which is a voluntary escape, and after A. returns to the prison, and the sheriff keeps him in prison upon the said execution, and thereupon A. brings an audita querela against B. he shall not be discharged thereupon, because it is at the election of B. whether he shall be in execution at his suit or not; for it is no discharge of the sheriff that he hath retaken him before the action brought by B. if he will bring his action against him; but A. shall not put B. to his action against the sheriff against his will; for perhaps the sheriff is not able to give a recompence to B. and so A. shall have advantage of his own wrong.* Hill. 10 Car. B. Rot. 1622. between \* *Trevillian and the Lord Roberts*, adjudged in an audita querela, in arrest of judgment, after a verdict for the plaintiff, by which it was found that the sheriff voluntarily suffered him to escape. Vide Co. 3. † *Rigeway* 52. b. seems to be the contrary.]

S. C. + Cro. E. 318. pl. 4. Pasch. 36 & 37 Eliz. B. R. and 439. pl. 55. Mich. 37 & 38 Eliz. B. R. Grills v. Ridgeway. S. C. but S. P. does not appear. — Mo. 660. pl. 902. S. C. but S. P. does not appear. — Poph. 47. *Geilles v. Rigeway*, S. C. but S. P. does not appear. — See tit. Execution, (U. a) pl. 5. 6. S. C. — S. P. Arg. Cro. E. 102. in pl. 9.

Where the plaintiff consented that the defendant in execution should come to him to a tavern out of the rules without a keeper or rule of court, in order to come to some agreement with him, but because no agreement was made, the plaintiff took him again on the same execution, and the defendant brought an audita querela, and adjudged well brought; for the execution was discharged by the prisoner's going at large. Sty. 117. Trin. 24 Car. B. R. *Walker v. Alder*.

[5. If a man in execution upon a judgment for debt or damages be delivered out of execution by the sheriff or gaoler who hath him in execution, with the assent of him who hath him [or for whom he is] in execution, and after, by colour of this judgment, he takes him again, and puts him in prison, an audita querela lies upon this matter, and thereupon he shall be delivered. Trin. 24 Car. B. R. between *Welby and Andrews*, adjudged. Intratur Trin. 23 Car. Rot. 1706.]

[327] Jo. 2:8. pl. 2. adjudged accordingly, but says not against whom it was brought, whether A. or C. —

\* Fol. 308.

Cro. C. 214. pl. 4. S. C. says it was demurred, because the audita querela was brought against A. whereas it ought to have been brought against C. but adjudged well brought. — See (H) 12 H. 4. 6. 15. contra.

[6. If A. hath a judgment against B. for debt or damages, and after A. extends the land of B. for his debt, and after assigns over the land extended to C. for all his estate therein, and after A. releases to B. the judgment, in this case B. upon his release, shall have an audita querela against C. the assignee, and therein avoid the extent, because A. notwithstanding the assignment, continues privy to the judgment, and after the assignment might have acknowledged satisfaction of the judgment, and so have defeated the estate of the \* assignee, and this release is all one as if he had acknowledged satisfaction of the judgment. Pasch. 7 Car. B. R. between *Flower and Elger*, adjudged upon demurrer.]

F. N. B. 104 (D) in the new notes there (b) cites 7 H. 6. 42. S. C. as resolved, that pending the

[7. If A. the consuee of a statute-staple brings a detinue against B. for the statute, who prays garnishment against C. the consuee, who comes and pleads, and the plaintiff recovers by judgment, and C. the garnishee brings a writ of error, and pending the writ of error B. the defendant either voluntarily, or by award of the Court, delivers the statute to A. who sues execution upon the statute

*in Chancery, and the body of C. is taken in execution thereupon, it seems before the judgment is reversed upon the writ of error, C. upon this matter cannot have an audita querela in Chancery, because the execution in Chancery is collateral to the proceedings in Banco, altho' the delivery of the statute to the plaintiff was error, if by award of the Court; and if it was by the voluntary delivery of the defendant, a writ of disceit lies against him. Vide 7 H. 6. 41, 42. ordered by the Court to shew his matter in Chancery.]*

on the statute; but it seems the consuee is put to his audita querela.—Br. Error, pl. 66. cites S. C. but mentions nothing of the audita querela.—S. C. cited 5 Rep. 90. b. in the case of executions, and the reporter was of opinion that he might be helped by audita querela.—S. C. cited 8 Rep. 143. b. and the reporter is there of the same opinion, as to the audita querela.—See (E) pl. 15.

[8. But in the said case, if upon the writ of error the judgment in the detinue be reversed, it seems the consuee shall be aided upon an audita querela in Chancery upon this matter, altho' by the reversal of the judgment the execution is not avoided, being collateral to the first judgment. Co. 5. *Hoe's Case*, 90. b. held upon the book of \* 7 H. 6. 41, 42.]

aided by aud. quer. \* Br. Error, pl. 66. cites 7 H. 6. 42. [and in the year book it is 42. a. b.]—S. C. cited per Cur. 8 Rep. 142. b. & ibid. 143. b. by the reporter, where he repeats, and continues his former opinion, that audita querela lies; because the cause and ground of the collateral action is disproved and destroyed by the reversal of the first judgment, and the first plaintiff restored to his first action, upon which he may have just and due remedy.

[9. But if a statute be delivered to B. to be kept in an indifferent band upon certain conditions between the consuee and consuee, if B. before the conditions performed, delivers it to the consuee, and he sues execution, quære whether the consuee may have an audita querela upon this matter, or whether he be put to his writ of disceit against B. for the delivery of the statute before the conditions performed. 12 H. 4. 6. 15. audita querela lies.]

not be brought but against him who is party to the record, unless it be in special cases. —Fitzh. Audita Querela, pl. 15. cites S. C.—Br. Audita Querela, pl. 1. cites 43 E. 3. 27. that the opinion of all the justices seemed, that the audita querela did not lie.—F. N. B. 304. (D) says the consuee shall have an audita querela.

[10. If the principal be taken in execution upon a judgment, and after a scire facias returned, according to the course, judgment is given against the bail, and thereupon he is taken in execution, and after the principal is delivered upon an audita querela, because the recoveror hath acknowledged satisfaction &c. in this case, tho' the recognizance was forfeited by the bail, by not bringing in the principal at the time appointed by law, yet inasmuch as the judgment and execution against the bail depends upon the judgment against the principal, and he was but a security for the payment of the money, of which the recoveror is satisfied, the bail shall be discharged by consequence. Pasch. 15 Car. B. R. between Hill and Barnes, adjudged upon a demurrer. Intratur Trin. 13 Car. B. R. Rot. 476.]

towards reversed in error, and thereupon an audita querela was brought by the bail, and the Court held it well brought; for that the judgment against the bail is quasi dependent on the first judgment, which rendered the bail liable; and that being set aside the bail ought to be discharged. Cro. J. 645. pl. 8. Mich.

errors and execution, he cannot have a suspensio; and also that the reversing the judgment does not defeat the execution had

This is mentioned in Hoe's Case by the reporter, as that it seems to him that in such case he shall be

book it is 42. 15. cites S. C. and says, it seems that action of disceit lies against him; for the audita querela can-

—Fitzh. Audita Querela, pl. 1. cites 43 E. 3. 27. that the opinion of all the justices seemed, that the audita querela did not lie.—F. N. B. 304. (D) says the consuee shall have an audita querela.

After judgment against the principal, another judgment upon a scire facias was had against the bail, and upon error brought the last judgment was affirmed. The principal judgment was after-

Mich. 20. Jac. B. R. Appesly v. Ives. — Palm. 187. Appesly v. Gene, alias Geve, S. C. adjournatur. Ibid. 301. Mich. 20 Jac. S. C. adjudged for the plaintiff in the audita querela. — Jenk. 319. pl. 21. S. C. accordingly. — 2 Roll. Rep. 254. Green v. Legris, S. P. held accordingly, and seems to be S. C. and the bail were discharged.

5. Rep. 86. [11. If *A. and B. are bound in an obligation jointly and severally, and judgment given against each upon several actions brought, and both taken in execution, and after A. escapes, yet B. shall not be delivered upon an audita querela; for tho' the obligee may have an action against the sheriff for the escape, yet till he is actually satisfied, the other shall not have an audita querela; for perhaps the sheriff is worth nothing.* Co. 5. *Blomfield*, 86. b.]

6. Blumfield's Case, Mich. 38 & 29 Eliz. B. R. — Mo. 459. pl. 634. Blomfield v. Wythe, S. C. but S. P. does not appear as to the aud. quer. but seems to be that aud. quer. does not lie. — Cro. E. 478. pl. 9. Blomfield's Case, S. C. Gawdy and Fenner J. (absentibus aliis) held this no cause to discharge B. — Ibid. 555. pl. 10. Blomfield v. Roswick, S. C. and Popham, Clench, and Fenner (absente Gawdy) held that this was no cause to discharge the other by aud. quer. — Ibid. 573. pl. 14. S. C. was moved again; and Popham thought that B. was relievable by the aud. quer. but Gawdy and Fenner e contra, & adjournatur.

Hob. 2. pl. 3. incerti nominis & temporis, but mentions it as cited by Ld. Coke, in B. R. — Godb. 257. pl. 355. Pasch. 12. [12. If two are bound in an obligation jointly and severally, and judgment given against each in two several actions, one in Banco, the other in Banco Regis, and after one is taken in execution in Banco Regis, and after an execution is taken in Banco against the other by elegit, and land and goods delivered in execution thereupon, he that is in execution by his body in Banco Regis shall be delivered upon an audita querela, because the execution upon the elegit is a satisfaction. Hobart's Reports, 3.]

Jac. B. R. Cowley v. Legat, S. P. and seems to be S. C. and the opinion of all the justices was, that the audita querela was well brought, and that because he could not have pleaded the special matter in bar. — Cro. J. 338. pl. 3. Crawley v. Lidgear, S. C. adjudged per tot. Cur. who delivered their opinions seriatim. — Roll. Rep. 8. pl. 1. Cowley v. Lydiat, S. C. and it is said in Marg. that judgment was for the plaintiff. — 2 Bulst. 97. S. C. adjudged accordingly. — But by Crooke J. it he, against whom the first judgment was given, had reversed it by a writ of error, peradventure the other party being taken by capias, shall have no benefit by such aud. quer. but Dodderidge J. e contra. 2 Bulst. 100. in S. C.

Two entered into a recognizance, and cognisee extended the lands of one of them by elegit, and afterwards took the body of the other in execution, who brought an audita querela, and was discharged, because the land of the other being extended for the same debt, that shall be intended a full satisfaction for the debt. 2 Bulst. 97. Trin. 11 Jac. B. R. Cowley v. Lydeot. — Cro. J. 338. pl. 3. Pasch. 12 Jac. B. R. Crawley v. Lidgear, S. C. & S. P. and the plaintiff was discharged. — Godb. 257. pl. 355. Cowley v. Legat, S. C. and held the audita querela well brought. — S. P. mentioned by Coke Ch. J. as ruled accordingly, and seems to intend S. C. Hob. 2. pl. 3. incerti nominis & temporis. — Ibid. in Marg. cites the Case of Cowley v. Legate.

[ 329 ] A judgment creditor extended lands of his debtor in one county by elegit, which was delivered to him in execution, and enjoyed by him 6 years; then he made his wife executrix, and died, and she brought a scire facias upon the judgment, directed to the sheriff of another county, where the debtor had other lands; and upon 2 nishils returned, she had judgment and execution for the same debt; whereupon she brought an audita querela, and was relieved; for after an elegit, if lands are thereby found, and the elegit filed, the party cannot have another elegit. Sty. 434. Trin. 1655. Strowd v. Keckwith.

Sty. 323. Barcock v. [ 329 ] [13. If *A. be bail for B. in an action in Banco, or B. R. and after judgment is given against B. and after a scire facias is sued against A. the \* bail, and upon two nishils returned in Banco judgment is given against A. in this case A. may have an audita querela, upon a surmise that B. died before any capias ad satisfaciendum sued out against him, by which he was discharged in law, and thereupon A. is to be discharged, because the recognizance of A. (which*

Sty. 323.  
Barcock v.  
Fol. 309.

Thompson,  
S. C. ad-  
judged ac-  
cordingly,



A. (which is, that B. shall render his body, or pay the condemnation) is not forfeited till a *capias* be returned against the principal; for he is not bound to render his body till a *capias* be returned, and tho' two *nihilis* be returned, and thereupon judgment is given against the bail, so that the judgment is not erroneous, yet because the bail had no summons, he shall be received to aver this in an *audita querela*, he not having any other remedy. Pasch. 1652. between *Tompson and Barcock*. Intratur Mich. 1651. Rot. 472.]

nisi, &c. for the plaintiff in the *audita querela*, by Roll Ch. J. and Nicholas, Jermain dissentiente, and Absente; and Nicholas said that the two *scire*

*facias*'s might be returned behind the party's back, and therefore it could not be said to be all one as if the party had appeared; for if he had appeared the case would have been otherwise.—Raym. 19. Arg. cites S. C. accordingly; but that upon a *scire facias* returned *audita querela* would not lie, cites Mich. 1657. B. R. *Kilburne v. Rack*.—In the Case of *Lampton v. Collingwood*, Cumb. 325. Pasch. 7 W. 3. B. R. Holt. Ch. J. said that he did not approve the cases of *HUNT v. GUNNEL*, in 4 Le. [24.] pl. 76. and [*COCKRINE v. HAWKINS*] Cro. E. 730. but preferred the later authority of *Barcock v. Thompson*.

Execution ought not to be sued against the bail till a default be returned against the principal. The recognizance of the bail is, that the principal shall yield himself &c. and this is intended to be upon process awarded against him; but no process being awarded against him in his life, it is impossible he should yield his body to prison being dead, and therefore the bail is discharged; per Popham, Gawdy, and Fenner; and so they awarded judgment for the plaintiff in the *audita querela*. Gouldsb. 154. pl. 108. Hill. 43. *Eliz. Hobbs v. Tadcastle*.—Mo. 432. pl. 607. S. C. adjudged accordingly.—Cro. E. 597. pl. 1. S. C. adjudged accordingly.—Jo. 29. says the precedent of this case was produced in Court accordingly.—S. C. cited as adjudged accordingly. Hutt. 47.—Noy 83. cites S. C.—Sty. 324. cites S. C.

14. If *tenant in tail* be bound in a *statute merchant*, and the land is extended by it by *elegit*, as the moiety which the tenant in tail has, and after the tenant in tail dies, the *issue* in tail may enter without *audita querela*. Br. Taile & Dones &c. pl. 22. cites 38 Ass. 5.

15. A man recovers by *assise*, and after is re-disseised by the first disseisor, and then he releases all his right to the disseisor, and after brings *redisseisin*, the disseisor cannot plead the release; for it is only inquest of office; but by some in this case he shall have *audita querela*. And so it seems that in several cases, where a man has bar to plead, and has no day in Court to plead it, he shall have *audita querela*. Br. Audita Querela, pl. 30. cites 40 Ass. 23.

16. *Audita querela* upon a *statute* to pay 60 l. and the indenture was to pay 40 l. and to do certain other covenants, and that then the statute shall be void, and said that he had paid all except 10 l. as appears by acquittance, and of the 10 l. he shewed that he had paid part for the defendant, and part in reparations at the command of the defendant, which he was not bound to do; and well, per judicium; quod nota; and therefore it seems that this is a payment to the defendant himself by another hand by implication; quod nota. Br. Avowry, pl. 6. cites 46 E. 3. 33.

Br. Conditions, pl. 32. cites S. C.

17. *Assise* against *tenant by statute staple*, the plaintiff said, that after the execution sued, the plaintiff repaid the money, and the defendant upon this rebailed the statute to him in lieu of acquittance, and after by covin retook it, and sued execution, judgment &c. and per Cur. he is put to *audita querela*, and shall not have the averment contrary to matter of record. Br. Statute Merchant, pl. 29. cites 43 Ass. 18. [ 330 ]

18. *Release of all actions* is not sufficient to have audita querela, for execution is not released by this. Br. Audita Querela, pl. 37. cites 3 H. 4. & concordant Littleton in his Chapter of Releases, and tit. Release in Fitzh. 53. for execution is no action.

Br. Audita Querela, pl. 33. cites 2 E. 4. 22. and so are all the editions at that word, but at tit. Scire Facias, pl. 170. all the editions are 2 E. 4. 24. and these last seem to be right, the S. P. being at 2 E. 4. 24. a. pl. 22. but S. P. does not appear at pag. 22.

19. He who is *condemned in debt or damages*, and *has release*, and *ca. fa. is issued against him*, yet if he be not taken he shall not have scire facias ad cognoscendum factum; but audita querela; for he shall not have the scire facias unless he be in person, per Cur. Br. Scire Facias, pl. 170. cites 2 E. 4. 24.

20. If in *account a man recovers*, and *before execution brings another writ of account*, or *recovers in debt*, trespass, and the like, and *does not take execution*, but *brings another action again*, and *recovers again*, if he takes 2 executions, the defendant shall have audita querela per Danby and others, quod non negatur. Br. Audita Querela, pl. 25. cites 9 E. 4. 50.

Br. Scire Facias, pl. 235. cites S. C.

21. If a man *sues execution upon a statute merchant or statute staple*, as *executor of the conussee*, or as *administrator against the conusor*, where *the conussee himself is alive*, or if the plaintiff be not executor or administrator, the conusor shall have audita querela, or action of disceit. Br. Audita Querela, pl. 38. cites 2 R. 3. 8.

22. And so note here and in F. N. B. in the writ of audita querela in the 6th Case, that audita querela *lies as well upon a statute staple as a statute merchant*, and *lies upon surmise*, and upon *matter in fact* as well as upon writing. Ibid.

23. If one *recovers as administrator where he is executor*, the party, against whom the recovery is, shall have aud. quer. supposing that he has no right to recover. Arg. Cro. J. 394. pl. 6. cites 2 R. 3. 8.

24. Aud. quer. lies where a man ought not to be charged, and had *matter to discharge himself by*, but that he *had no day in Court* [to plead it], and [so] no default was in him; per Vavisor. Kelw. 25. a. Pasch. 12. H. 7.

S. C. cited F. N. B. 104. (U) in the new notes there (b) at the end.

25. A. made a *recognizance in a statute merchant before the mayor of Chester* to B. where it was *supposed that he had no authority to take it*. A. infeoffed J. S. B. sued execution, and J. S. brought aud. quer. D. 35. a. pl. 27. Trin. 29 H. 8.

26. The *lord of a copyhold court by petition to him reversed a judgment given there*, for certain errors in the proceedings, and thereupon the defendant maintained aud. quer. to be restored to his damages recovered against him; cited by Fenner J. 4. Rep. 30. b. at the end of pl. 22. and said he had seen such record of anno 36 H. 8.

27. *Conusor levied a fine of parcel of his land to the conussee*, who afterwards sued execution, and *took the body of the conusor in execution*, whereupon the conusor sued an *aud. quer.* in Chancery; but adjudged by the Ld. Chancellor and 2 judges assistants, that it *did not lie*. Pl. C. 72. Pasch. 5 E. 6. Roffe v. Pope.

28. After *recovery in waste by default*, the defendant sued an *aud.*

quer. to the justices of C. B. surmising that he was not summoned, nor attached, nor distrained; for which the justices granted out of the Rolls in C. B. a writ of *disceit* against \* [the party, because] the audita querela was but a commandment to the justices to do right to the party &c. Trin. 19 E. 3. And yet † [fo] they shall proceed upon the writ of *disceit*, and not upon the aud. quer. F. N. B. 105. (A.)

Audita querela by A. for that he became bound with [ 331 ] B. in a bond to C. he being within age and that

C. prosecuted an original writ in debt against him, and procured an attorney to appear to the action without his notice, and that upon non sum informatus entered, and judgment by default, he was taken in execution; but adjudged for the defendant that it is not a sufficient surmise to discharge him; for his remedy is by writ of *disceit* against the attorney, and not by audita querela. Cro. J. 694. pl. 7. Mich. 22 Jac. C. B. Allely v. Colley.

\* Those words are omitted in the English editions.

† Orig. is [iffint].

29. If a man leaves land unto A. for life, and afterwards by fine grants the reversion to B. in fee, and dieth, and the heir of the recognisor and one L. by covin betwixt them, sue a *præcipe in capite* against the said A. supposing the land to be holden of the king, whereas it is not holden of the king, but of another person; and in this *præcipe in capite* they cause one F. to appear as attorney for A. and to join the *mise* in the said writ; and afterwards the attorney by covin doth make default, for which judgment is given against A. Now upon the same matter he shall have an audita querela directed unto the justices of C. B. commanding them to proceed as well for the restitution of the land, as upon the *disceits*, and to do speedy justice, as of right, according unto the custom of the realm, they ought to do. F. N. B. 103. (A.)

See 17 E. 3. 60. A. tenant for life, remainder to B. in tail, C. by covin between A. and B. supposing them jointenants, and one D. answers as attorney for B. and process is continued till they make default after

issue joined, whereupon judgment final is given, and B. shews this, and prays that it be entered, for that it is within the year; and it was entered on record, and also agreed that he shall have restitution, but A. shall not; for he has forfeited his estate, that he should not have restitution on a general bill of *disceit*; but ought to sue an audita querela in Chancery on his case, tam super restitutione ten'ti quam pro deceptione puniendâ. F. N. B. 103. (A) in the new notes there (b) cites 17 E. 3. 46. and so note restitution at least, where the demandant was party to the *disceit*. See 21 E. 3. 45. 19 H. 6. 44. 1 H. 4. 5. Stat. 21 Jac. 1. cap. — 17 E. 76. register 114, 115.

30. A. infeoffs B. on condition to re-infeoff A. and C. his wife for their lives, remainder to D. the daughter (son) of A. and the heirs of his body, and the said B. by collusion between him and E. makes a recognizance of 200l. to E. and one F. (after the re-infeoffment as it seems). A. dies, and C. takes G. to husband, who on this matter sues an audita querela, and it was resolved that he need not count upon this writ; that though he may have remedy by writ of *deceit* or conspiracy, yet seeing here is matter of record, which is the ground of the writ, it is good but for that E. was party to the recognizance, and by the writ is supposed party to the collusion, this suit is to defeat the recognizance, and not to recover damages the writ shall abate. 26 E. 3. 73. F. N. B. 104. (U) in the new notes there (b.)

31. Executors had judgment in account, and took the defendant in execution for the arrears. The will was afterwards set aside, because the testator was an idiot, and the record thereof in the Spiritual Court was removed by writ into Chancery, and sent into B. R. where the action was brought, and thereupon the defendant brought aud. quer. because the will was disproved; and resolved in the Exchequer Chamber (as appears by the record,

D. 203. b. 204. a. pl. 75. Moyer v. Carvanel.

record, as the reporter says he had heard) that the aud. quer. well lies. 8 Rep. 144. a. cites D. 3 Eliz. 203.

Dal. 58. pl.  
7. S. C.

32. Judgment against the *defendant*, who was afterwards taken by virtue of a *ca. fa.* and escaped; the *sheriff* did not return the *ca. fa.* at the day, and thereupon an *alias ca. fa.* issued against the defendant, upon which he was retaken by the *sheriff*, and thereupon the defendant brought an audita querela, and by Dyer and Weston it was held good. Mo. 57. pl. 163. Pasch. 6 Eliz. Anon.

This case in Dyer seems not to be a case of the year mentioned, but to be a case of Hill 5 H. 12. H. 7. S. P. admitted.

33. *At the exigent after judgment the defendant cannot appear gratis and plead a release of all executions to have a sci. fa. ad cognoscendum vel deducendum factum*, but there must be a *cepi corpus*, or a *reddidit se*, returned; but being at large he must bring an aud. quer. D. 285. b. 286. a. pl. 41. Trin. 11 Eliz. Anon.

8. and the same is in Kelw. 166. b. pl. 3. accordingly.—See Kelw. 3. pl. 5. Mich.

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34. Aud. quer. lies properly when the verdict is allowed, and there is some matter in equity; per Shute B. But to have aud. quer. upon matter contrariant to the verdict, as was moved in the principal case, he thought was strange. Sav. 69. 70. pl. 144. Mich. 26 Eliz. Borrow v. Lake.

35. Audita querela lies properly where the verdict is allowed, and there is some matter in equity, but not on matter contrary to the verdict, per Shute J. Savil. 70. pl. 144. Mich. 26 Eliz. in Case of Borrow v. Lake.

36. A. was bound to B. by recognizance of 400l. and B. was bound to A. in a bond of 100l. B. by the custom of London attached the 100l. due by himself to A. in his own hands, and sued execution against A. upon the recognizance. A. upon the matter of the attachment brought aud. quer. and after some doubting the Court received the writ de bene esse, and granted a supersedeas to stay execution, and a scire facias against B. but ea lege that A. find sufficient sureties that he would sue with effect, and to pay the execution if found against him. Le. 297. pl. 407. Hill. 28 & 29 Eliz. C. B. Wallpool v. King.

37. The cognizor of a statute staple was taken in execution, and then the money was brought into Court, and upon an aud. quer. moved to be bailed, and the money to remain in Court till the aud. quer. determined; and the Court refused to deliver the money to the conufee, but ordered the prothonotaries to keep it till the aud. quer. was determined, and let the conufor to bail for the costs of suit. Le. 141. pl. 196. Hill. 30 Eliz. C. B. Askew v. the Earl of Lincoln.

38. The conufor of a statute staple was taken, and escaped with consent of the *sheriff*, no execution being made of his lands or chattels; afterwards the conufor sued execution of his lands, whereupon he brought aud. quer. but adjudged that the aud. quer. did not lie. 2 Le. 96. pl. 117. Trin. 31 Eliz. C. B. Linacre v. Rhodes.

And. 266.  
pl. 273. S.  
C. accordingly.  
Roll. Rep.  
204. S. C.  
cited.—  
5 Rep. 86.  
b. S. C.

cited.—Le. 230. pl. 313. Pasch. 33 Eliz. C. B. Linacre's Case, S. C. Anderson Ch. J. said that if a man be in execution by his body and lands upon a statute, if the *sheriff* permit the conufor to go at liberty, yet the execution of the land is not discharged; but if he go at large by the consent of the conufee, then the whole execution is discharged, and the conufor shall have his land again presently.

39. E. and G. were bail for K. at the suit of A.—K. was condemned, and a ca. fa. awarded against E. and G.—G. was taken, who suggested to A. that E. was sufficient to satisfy him, but that he himself was not. Whereupon A. consented that G. should go at liberty, so as he would procure E. to be arrested, which he did. E. being arrested sued an aud. quer. upon that escape of G. and they were at issue upon the escape. And by advice of the Court a juror was withdrawn by consent, and so the matter was stayed. 3 Le. 260. pl. 346. Mich. 32 Eliz. B. R. Evans v. Arnold.

40. A statute merchant was acknowledged in Lincoln, which had but one seal to it, whereas by the statute 13 E. 1. de Mercatoribus, it ought to have two, and execution being taken upon this statute, the cognizor brought an audita querela; it was objected, that a writ of error was the proper remedy in this Case; but held clearly, that where a statute is erroneously acknowledged error lies not, but aud. quer. for it is no record. Cro. E. 233. pl. 4. Pasch. 33 Eliz. C. B. Ascue v. Fuliambe.

& 37 Eliz. B. R. Fulshaw v. Ascue, S. C. in error brought in B. R. and the judgment in C. B. was affirmed.

Le. 218. pl. 310. Ascew v. Fuliambe, S. C. adjudged in C. B. for the plaintiff.—Cro. E. 319. pl. 6. Pasch. 36

41. Administration was granted to J. S. durante minoritate of A. an infant executor. J. S. brought debt against W. R. for money due to the testator, and recovered, and had W. R. in execution, and then A. comes of full age. The question was, how W. R. should be discharged of the execution, the administrator's authority being determined so as he cannot acknowledge satisfaction? Windham said, that peradventure W. R. might have an aud. quer. 3 Le. 278. pl. 367. Mich. 35 Eliz. C. B. Anon.

Godb. 104. pl. 122. Mich. 28 [ 333 ] & 29 Eliz. C. B. S. P. exactly, and in totidem verbis; and in both books is

cited the following case, which Rhodes said he had seen, viz. that A. was bound unto B. in an obligation of 100 l. upon condition to pay a lesser sum; the obligee made an infant his executor, and died; administration was committed durante minoritate to C. to whom A. paid the money. It was doubted, if that payment was rightful, or if the money ought to have been paid to both. Windham asked, if it appears within the record that the infant was made executor, and that administration was committed ut supra; to which it was answered, No. Then Windham said, You may upon this matter have an audita querela.

42. If A. did recover against B. by two several judgments, whereby B. is in execution, it was adjudged that he shall not have one aud. quer. only, but must have two several writs. Ow. 107. in a note cites Pasch. 36 Eliz. B. R. Curtis v. Overfcott.

Noy. 83. in case of Hodges v. Moor cites the Case of Curtesie v. Westcot, S. P. adjudged accordingly.

43. An infant confessed a judgment in debt brought in B. R. against him. Popham held clearly that aud. quer. during his nonage does not lie upon action of debt in Court, as it would upon recognizance or statute acknowledged; but the party might have error in the Exchequer Chamber by the statute of 27 Eliz. but cannot have it in B. R. Mo. 460. pl. 642. Mich. 38 & 39 Eliz. Randal's Case.

44. A. seised of lands in Middlesex and London acknowledged a statute to C. and afterwards conveyed the land in Middlesex to J. S. which came to the plaintiff by purchase, and the land in London he conveyed to G. the defendant; the administrator of C. sued a sci. fa. against A. in Middlesex, who was returned mortuus, upon which he had a sci. fac. to the tertenants in Middlesex generally,

and V. the plaintiff was returned tertenant, and made default; upon which judgment was given for execution, and that a moiety of the land in Middlesex should be extended, upon which he brought a *sci. fac.* in the nature of an *audita querela* against the administrator, and G. tenant of the lands in London, to shew cause wherefore the moiety of the lands in London should not be extended. It was the opinion of Popham Ch. J. that he might have a writ wherefore the lands restitui non debent, but not an *aud. quer.* But the other justices held, that that was the most beneficial way for him who was grieved by the former extent; but if he will not pray restitution of what is past, but only a contribution for an equal extent to satisfy what did remain, they saw no cause but that he might have it; for the foundation of the writ is of equal extent; and it was said, that the book of 39 E. 3. 7. and 39. was, that it was in election of the conusee to take his *audita querela* for restitution, or for future contribution. Mo. 535. pl. 700. Pasch. 39 Eliz. in Canc. Verey v. Carew and Gibson.

S. C. cited  
Arg. Mo.  
645. in pl.  
892.

45. M. was bound to W. in a statute defeasance, that if he and his wife should make such good assurance of a house with such covenants as W. should accept and signify under his hand to be reasonable, or should pay before 1 Aug. next 350l. an *aud. quer.* will not lie upon a surmise that W. had not signified what assurance he would accept; nor required any, and yet had sued execution &c. for the conusor ought to have devised the estate, and procured W. to accept, otherwise he ought to pay the money. Cro. E. 718. pl. 44. Mich. 41 & 42 Eliz. C. B. Mills v. Wood.

2. And. 170.  
pl. 93. S. C.  
—agreed.  
Yelv. 12.  
Hinde v.  
Dean.

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Mich. 44  
& 45 Eliz.  
B. R. the S.  
C. and  
judgment  
affirmed in  
error; for  
D. being in

46. The plaintiff was conusee of a statute, and Sir F. H. was conusee of an elder recognizance, the conusor had lands in the counties of C. and M. the plaintiff sued execution, and had it, of the lands in C. the defendant sued execution, and had the moiety of the lands in C. and nothing in M. The plaintiff sued *audita querela*, and it was adjudged it lies upon this surmise, for the recognissee ought to have sued execution of the lands in one county as in the other, whereby the money would be levied the sooner; and so the not suing of execution according to the law is a prejudice to the plaintiff. Cro. E. 797. pl. 43. Mich. 42 & 43 Eliz. C. B. Dean v. Hind.

by judgment and by title by extent of the statute, ought to have his land liable to the extent upon the recognizance pro rata only, and therefore H. ought to have included all other the lands of the conusor in his extent as well as the lands of D. But if D. had not had his land by title, but by disseisin or other tortious means, then he ought not to be relieved upon *audita querela*.—Noy 47. S. C. and judgment affirmed.

48. In trover by an administrator for the goods of the intestate, the defendant pleaded that the letters of administration were revoked in the Spiritual Court, *per debitam legis formam*, and granted to another; adjudged no good plea, because it is a matter wherein he can be aided only by an *audita querela*. Yelv. 125. Pasch. 6 Jac. 1. B. R. Kett. v. Life.

49. B. was in execution upon a statute-merchant at the suit of R. he brought *audita querela*, and shewed articles betwixt him and R. to discharge him of the statute, and prayed to main-prised; but the Court denied it, and said that one in execution ought not to be let

to main-prise upon a surmise; but the party's remedy is to have his action of covenant upon the articles against the party. Cro. J. 218. pl. 7. Hill. 6 Jac. B. R. Beston v. Robinson.

50. Judgment against the principal, and upon 2 scire facias's against the bail, nihil returned, judgment was against the bail, who moved for an audita querela, for that he was within age. Williams J. held, that it did not lie; but it was allowed by the others de bene esse; for to deny it, if by law it lies, they said would be injustice. Yelv. 155. Trin. 7 Jac. B. R. Markham v. Turner.

Cro. J. 648. in pl. 8. cites it to have been allowed after a judgment on a scire facias against accordingly.

him, and that by the audita querela he was discharged. — Jenk. 319. pl. 21. S. P.

51. If the party be taken and imprisoned upon a judgment and execution where he has paid the money, he shall have no other remedy in Court, but only an aud. quer. per Williams J. and the Court. Bulst. 152. Trin. 9 Jac. Anon.

52. If joint trespassors are sued in several actions, tho' the plaintiff may make choice of the best damage, yet when he has taken one satisfaction, he can take no more; and if he requires two, an aud. quer. lies. Hob. 66. pl. 69. in Case of Cocke v. Jennor.

53. Two were taken in execution, and afterwards one escaped; adjudged debt lies against the sheriff for this escape, and after the recovery against him, the other shall be delivered by aud. quer. per Coke Ch. J. Roll. Rep. 205. in pl. 6. Trin. 13 Jac. B. R. cites Norgate's Case.

54. B. brought an audita querela, and surmises that A. administrator of J. S. brought debt on a bond, but that before judgment the administration was revoked, and granted to C. and notwithstanding the revocation, A. pronounced judgment, and that C. released; B. brought an audita querela upon the release, but the Court would not grant a superseatas, because the revocation was but matter of fact; for the revocation was not under seal, and so A. might appeal. Brownl. 29. Trin. 13 Jac. Beck's Case.

55. D. seised of land in fee, acknowledged a statute merchant to M. of 500l. to be paid to the said M. &c. but mentioned no day of payment; D. made a lease of the land to A. for years, who grants his estate to B. afterwards M. dies intestate, and his administrator extends the land, whereupon B. brings an audita querela, and whether it lay or not was the question; or that because there was no day of payment the statute was good or not; adjudged by three justices contra Hutton J. quod querens nil capiat. Bridgm. 16. 19. Trin. 22 Jac. C. B. Melkin v. Hickford.

Win. 82. Hickford v Machin, S. C. adjudged accordingly, with the arguments of the judges.

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— Jo. 52.  
pl. 3. Mafkelyne v. Higford,

S. C. held accordingly.

56. Scire facias against executors, the sheriff returned nulla bona; afterwards, upon a testatum, that they had wasted the goods of the testator, a new scire facias with a fieri facias issued against them, upon which there were two nibils returned, and thereupon judgment was given against them de bonis propriis; but because they were never summoned, nor had any manner of notice of these

proceedings, they may be relieved by an audita querela; per Roll Ch. J. Style 372. Trin. 1653.

57. *A tenant for life, remainder to B. his son in tail.* A. enters into a statute and dies, conusee sues *scire facias* against B. who is returned warned, and has execution by default; B. cannot have audita querela. Sid. 54. pl. 22. Mich. 13 Car. 2. B. R. Day v. Guildford.

Mod. 62. S. C. adjudged accordingly. —2 Kebb. 668. pl. 33. S. C. adjudged accordingly. —As to the power of the administrator after the repeal, without saying any thing as to the audita querela. See Yelv.

83. Brownl. 21. and Noy 15. Barnhurst v. Yelverton.

58. D. as administrator recovered damages against T. the plaintiff in trover, and afterwards upon appeal his administration was revoked, and granted to J. S. T. brought audita querela, and declared that D. intended to take him in execution for the said damages &c. It was argued that the administration being repealed, D.'s title is determined, and that now it belongs to J. S. and that T. could not plead this matter to the action brought by D. because it has happened subsequent to that judgment, and therefore relievable now by audita querela; and because, if D. should recover and receive them, J. S. would afterwards recover them again against D. therefore to avoid circuitry of action, the plaintiff in the audita querela had judgment, per tot. Cur. 2 Saund. 148. Trin. 22 Car. 2. Turner v. Davis.

Mod. 170. pl. 8. S. C. but upon the pleadings the Court was of opinion

against the plaintiff.

59. *Judgment against 2, who are both in execution, and the sheriff suffers one to escape; the plaintiff recovers against the sheriff, and hath satisfaction, the other shall be discharged by an audita querela.* 2 Mod. 49. Trin. 27 Car. 2. C. B. Alford v. Tatnel.

60. Audita querela is not to be allowed but in open Court, per Cur. 2 Show. 239. Mich. 34 Car. 2. B. R.

61. Audita querela shall never be had upon any matter whereof advantage might have been taken by plea before judgment. Arg. said to be a rule, and the Court agreed it to be a true and good rule. 2 Show. 240. Mich. 34 Car. 2. B. R.

62. There ought to be some deed under hand and seal, as defeasance, release, or the like, to ground the audita querela upon. Arg. and agreed by Dolben J. 2 Show. 240. Mich. 34 Car. 2. B. R.

63. If a release be given after the *nisi prius*, and before the day in Bank, he cannot plead it; for there is a verdict already in the cause, and upon another plea, and therefore the cause is determined; so that he is put to his audita querela to hinder the execution of his judgment. G. Hist. of C. B. 83.

The fact assigned for error was in the suggestion of the writ itself,

and not in any of the proceedings in the cause, and adjudged that error would not lie but only an audita querela. Carth. 282, 283. S. C. —1. Salk. 202. pl. 3. S. C. accordingly. —Ld. Raym. Rep. 27. S. C. accordingly.

64. The merits or foundation of a suit are not assignable for error in fact, but must be relieved by audita querela. Cumb. 325. Pasch. 7 W. 3. B. R. Lampton v. Colingwood.

65. Per Holt Ch. J. in many cases where a man may have an audita querela, B. R. will relieve upon motion; but if the ground



of the audita querela be a *release*, or other matter of fact, it may [ 336 ] be reasonable to put him to his audita querela, because the plaintiff may deny it. *Ld. Raym. Rep. 439. Pasch. 11 W. 3. B. R. Wicket & Foot v. Cremer.*

66. A man can have no audita querela of a matter which he had an opportunity of taking advantage of before, and had omitted it. *Per Holt Ch. J. 12 Mod. 584 Mich. 13 W. 3. obiter.* But if a man has a release from the plaintiff, which he has not an opportunity of pleading, and brings reasonable proof of it, the Court will relieve him upon motion, and award a *superfedeas* of the execution. 12 Mod. 598. Mich. 13 W. 3. in a nota.

67. If an escape be against a sheriff, and judgment thereon, and a writ of error is brought, and the first judgment is reversed, the party shall have an audita querela; *per Holt Ch. J. 11 Mod. 70. pl. 8. Hill. 4 Ann. B. R. Anon.*

68. A. and B. were bail for J. S. and W. R. B. was taken in execution, and afterwards execution was had against W. R. The Court said that there was a very good remedy for B. by audita querela. *Barnard. Rep. in B. R. 141. Hill. 2 Geo. 2. Steers v. Mitchell.*

### (E) Upon what Thing it lies. Upon a Specialty.

[1. IF the party in execution upon a judgment shews to the Court a release or acquittance, a scire facias lies thereupon, because this is grounded upon a specialty. 18 H. 6. 19. 9 H. 5. 1. admitted.]

[2. If the party after judgment shews a release of the judgment, yet if there be any variance in the names between the record and the deed, he shall not have any scire facias. 8 H. 6. 30.]

the names, (and adds) or the like.——Fitzh. Variance, pl. 4. cites S. C. & S. P. as to names, but mentions not (or the like), and the Year-Book mentions (names) only.——See (L) pl. 6. the like point.

[3. The conusor of a statute shall have an audita querela upon shewing the acquittance of the conusee. \* 45 Ed. 3. 24. † 47 Ed. 3. 1. b. 11 Ed. 4. 8. ‡ 3 H. 4. 12.]

nusor prayed a venire facias against the conusee; sed non allocatur, but was put to his audita querela.——Fitzh. Audita Querela, pl. 2. cites S. C. & S. P. admitted. † Fitzh. Audita Querela, pl. 14. cites S. C. and because the writ mentioned that the conusee had given acquittance to the conusor, the conusor being in prison, was discharged.——Br. Statute Merchant, pl. 9. cites S. C.

[4. If there be two conusees of a statute, and one releases, and after the other sues execution, an audita querela lies thereupon; for the debt is released. 11 Ed. 4. 8. b.]

S. P. but seems admitted.——The defeasance of one shall be a bar of both. Br. Audita Querela, pl. 11. cites 48 E. 3. 12.——See (K) pl. 4. S. P.

[5. A scire facias does not lie for a man in execution upon a verbal suggestion, without shewing a specialty. 18 H. 6. 19.]

payment, and verdict, and judgment for the plaintiff, and the defendant in execution brought an audita querela. In debt upon a single bill the defendant pleaded

*audita querela, and upon a single averment of payment of the money he was bailed.* Upon a motion by the judgment-creditor it was adjudged that this audita querela would not lie. Bullt. 140. Trin. 9 Jac. Torrey v. Adey.

See the next pl. in the notes.—  
See pl. 17. contra, and the notes there.—  
See (H) pl. 2.—(L) pl. 6. S. P.

[6. If a man *recovers* a debt or damages against another, who *pays him without other release or acquittance*, and notwithstanding the *recoveror sues execution*, no audita querela lies; for a record cannot be discharged without a specialty or record. Diversity of Courts, title Chancery, no remedy at common law, nor in Chancery.]

Br. Conscience, pl. 23. cites S. C. & S. P. accordingly.—Fitzh. Subpœna, pl. 16. cites S. C. of a debt recovered.—See pl. 17. contra, and the notes there.

[7. If A. be *bound to B. in a statute-merchant*, and *pays the money*, and after B. *sues execution* upon the statute, A. shall not have an audita querela upon this surmise that he has paid the money, without shewing an acquittance, or specialty, or release. 22 Ed. 4. 6. No relief at common law, nor in Chancery, because it was his folly to pay it without matter of record or specialty.]

Fitzh. Audita Querela, pl. 22. cites S. C. & S. P. accordingly.—F. N. B. 104. (C.)

[8. If a man *sues execution* upon a statute-merchant, the *conusor* shall have audita querela upon a *suggestion that he hath agreed with him, and that the conussee delivered to him the statute in lieu of an acquittance, shewing the statute*, and that the conussee has sued execution upon a forged statute. \* 17 Ed. 3. 49. 18 Ed. 3. 36.]

S. P. and if the conusor sues an audita querela against the conussee, and shews a statute cancelled, and says the same was delivered to him in lieu of acquittance, the recognizee may shew the true statute, and shew that the statute shewn which was cancelled was a forged statute, and thereupon he shall have a writ unto the justices in the nature of audita querela, commanding them that they may send for the mayor and the clerk, and for the parties, and for to do right, and the examination of the mayor and clerk shall try and end the matter; quod vide M. 11 E. 1.—And in such case execution shall be awarded, if the conusor does not shew the true statute. F. N. B. 104. (H) in the new notes there (a) cites 18 E. 3. 36. See 17 E. 3. 49. 21 E. 3. 46. contra.

[9. So an audita querela lies, *altho' the statute which he shews, which was given in lieu of an acquittance, be cancelled.* 18 Ed. 3. 36. Fitz. Mat. 104. (C.) 15 Ed. 3. Audita Querela 10.]

[10. But he shall not have an audita querela, *without shewing the statute.* 18 Ed. 3. 36. adjudged.]

[11. If the conussee *delivers the statute in lieu of an acquittance, and after retakes it* from the conusor, and *sues execution*, the conusor shall have an audita querela thereupon, because he does not shew the statute; ~~for~~ notwithstanding \* the delivery in lieu of an acquittance, it continues his deed, and is a good statute; contra 43 Aff. 18. by three justices.]

It was urged that he might have

\* Fol. 310.

trespasses of the taking.

and therefore should not have audita querela without shewing the indenture; but the justices held that the conussee may die, and then the action of trespass is determined, and yet his executors may sue execution upon the statute, and so mischief; and therefore the audita querela lies without shewing the indenture. Br. Aud. Quer. pl. 9. cites 47 E. 3. 25. But Brooke adds a quære, for he says that 1 H. 7. 15. is contra.—Ibid. pl. 31. cites 43 Aff. 18. that if statute staple be delivered in lieu of acquittance, and conussee retakes it by covin, that by the redelivery it is in lieu of acquittance and loses the force of a statute, and is not now the deed of the conusor.

Fitzh. Scire Facias, pl.

[12. If a man be taken upon a *capias ad satisfaciendum*, upon

a recovery in debt upon an obligation, if the defendant shews the obligation, and says that it was delivered in lieu of an acquittance, he shall have a scire facias thereupon, in nature of an audita querela. 147. cites S. C. & S. P.

13 H. 4. 10.]

13. An audita querela lies upon a suggestion, that he made the statute merchant, per durefs of imprisonment. 20 Ed. 3. Audita Querela 27. F. N. (B) 104. L. 15 Ed. 4. 5. b.]

[338] If a man be bound in a statute merchant, and certain in-

debtures of defeasance are made of the said statute, and afterwards the conusee doth arrest the recognisor, and imprisoneth him, and taketh the defeasance from him, and then sueth execution upon the statute; the recognisor shall have an aud. quer. against him upon the whole matter. F. N. B. 103. (C). ——— So if one makes a statute merchant or staple by durefs, he shall have an aud. quer. to avoid the statute by his imprisonment. F. N. B. 104. (L.)

[14. An audita querela lies upon a suggestion that he was within age at the making of the statute merchant, and yet is, for this shall be tried by inspection. 13 Ed. 3. Audita Querela 26, 27. F. N. 104. R. 15 Ed. 4. 5. b.] See (A) pl. 12. and the notes there.

[15. In detinue for a statute, if the defendant says, that the conusor delivered it into his own hands to deliver to the plaintiff upon conditions performed, and hath garnishment against the conusor, who pleads with the plaintiff, and pending the action the defendant delivers the statute to the plaintiff, who sues execution; the garnishee shall have an audita querela thereupon, without deed, for here the condition is but a conveyance, which appears also of record, and the deceit to the Court, which is also of record, is the cause of the action. 12 H. 4. 6. 15.]

Br. Audita Querela, pl. 15. cites S. C.— Fitzh. Audita Querela, pl. 15. cites S. C.

[16. If the conusee of a statute sues execution, and after the conusor tenders to him the money, and he refuses it, yet he shall not have an audita querela upon this matter, because this is grounded upon a matter in fact, and he may tender it in Court, and then have a scire facias, or audita querela; contra 22 Ass. 44.]

Br. Audita Querela, pl. 29. cites S. C. and by Banke. J. if the conusor tenders the money after execution

delivered of the land, and the conusee refuses it, the conusee shall have audita querela. Quod non negatur.

[17. If a man recovers against B. in debt upon an obligation, and before execution B. pays to him the condemnation, and after the recoveror sues execution against him, he shall have an audita querela upon the suggestion of this matter, tho' he hath no specialty thereof. Mich. 40, 41 Eliz. B. R. between \* Malines and Dame Hawkins, per Curiam dubitatur. Trin. 14 Jac. B. R. between Moreston and Pierce, whether the bail shall have an audita querela.]

\* Cro. E. 634. pl. 31. S. C. and the opinion of the whole Court was, that an aud. quer. well lies upon this matter of fact, to discharge

the execution. ——— Cro. J. 29. pl. 7. S. C. cited, arg. that it was ruled to be a good surmise in an aud. quer. to avoid execution of a judgment, for it is not only a suit in law, but in equity also, and it is a commission to examine the cause; for it is not reasonable that if the money be satisfied, he should lie in execution; and so held all the Court in the principal case (besides Popham) that it was a good surmise in that Case of OGNEIL v. RANDAL, Pasch. 2 Jac. B. R. the point there being the same, and thereupon the defendant in that case was let to bail. ——— S. C. cited Arg. Roll Rep. 384. in pl. 5.

† Mo. 850. pl. 1158. Moyn v. Pierce, S. C. the aud. quer. was brought by the bail, who was taken in execution, and suggested that the principal had paid the damages; but the Court would not bail him, because such suggestion of itself is not sufficient, without an affidavit that the money was paid. ——— Roll Rep. 383. pl. 5. Morison v. Morrice, S. C. says, that the bail was ordered to be com-

mitted in execution to the marshal, and then it was moved to bail him, upon bringing all the money into Court; but Coke said, No, but that it should be delivered to the party, and then he should be discharged; but if there be any one who knows that the money was paid, then perhaps it may remain in Court; but there was no one that could testify it, and thereupon the plaintiff in the aud. quer. declared that the suggestion was not true, and therefore would not proceed any further in it.

A man being in execution was suffered to go at large, and afterwards taken again, and brought audita querela, but the Court would not allow it; but it being further alleged that whilst he was at large he paid the money, and witnesses sworn to the truth thereof, the audita querela was allowed. Cro. E. 44. pl. 6. Mich. 27 & 28 Eliz. C. B. Reynold's Case.

[ 339 ] 18. Audita querela lies upon surmise, and upon matter of fact as well as upon writing. Br. Audita Querela, 38. cites 2 R. 3. 8.

The cognisor of a statute took out a ca. sa. against the cognisor, upon which he was taken in execution; but there being a *defeasance* on the statute, which was not performed by the cognisor, thereupon the cognisor brought an audita querela, and was bailed. Brownl. 39. Hill. 12 Jac. C. B. Earl of Lincoln v. Wood.

19. If a man be bound in a statute merchant or staple unto another man, and afterwards the *recognisee* makes a *defeasance* unto the *recognisor*, now if the *recognisee* sues execution upon the statute against the form of the indentures, the *recognisor* (or his executors, if he be dead) may have an audita querela against the *recognisee*. F. N. B. 105. (C).

20. After judgment in replevin for the avowants, one of them released, whereupon an audita querela was brought, and moved to be allowed, in order to supersede the execution; the release was produced, but the witnesses being in the country, an affidavit was offered to prove their hands, but the Court would not allow the audita querela, because no witness was present to prove the release, and less regard was had thereto, because it appeared by affidavits that he who executed the release was joined by *Practice*, without the consent of the other avowants. Sid. 351. pl. 2. Hill. 19 & 20 Car. 2. B. R. Nuby v. Jenkins.

### (F) Upon a Deed. [But where not without a Deed.]

\* Fitzh. Audita Querela, pl. 36. cites S. C.

Conusee upon a statute staple purchased parcel of the land, J. S.

purchased another part; the conusee extended the land of J. S. who thereupon brought audita querela in C. B. and had a superedeas upon it, and it was adjudged that it did well lie. Cro. E. 364. pl. 27. Mich. 36 & 37 Eliz. Charnock v. Gerard.

If the *recognisor* infeoffs a stranger of parcel of the lands, and afterwards infeoffs the *recognisee* of another parcel of the lands, and afterwards the *recognisee* sues execution against the *recognisor*, and the *feoffee*, the *feoffee* shall have an audita querela against the *recognisee*, and discharge his lands, because that the *recognisee* has discharged his parcel of land which he purchased by his own act. F. N. B. 104. (N).

And another audita querela appears in the register for the *feoffee* of parcel of the land which belonged to the *recognisor* against the *recognisee*, because that the *recognisee* hath purchased other parcel of the lands of the *recognisor*, &c. F. N. B. 105. (E).

[3. If

[3. If a man makes a *feoffment upon condition to re-infeoff* him, and after the *feoffee*, to the intent to deceive him, falsely and by covin between him and B. *acknowledges a recognizance to B. and after re-infeoffs him*, the *feoffee* may have an *audita querela* upon this matter; for this is grounded upon the matter of record, as well as upon the deceit, which is matter in pais. 26 Ed. 3. 73. adjudged.]

[4. If a man acknowledges a *statute which is usuriously made* against the statute, and after the *conusee sues execution*, the *conusor* shall have an *audita querela* upon this matter. Pasch. 3 Jac. B. R. between *Barnes and Worlice* admitted.]

whether the agreement was usury or not. Cro. J. 25. pl. 2. S. C. & S. P. accordingly. — Roll Rep. 384. pl. 5. Trin. 14. Jac. B. R. Coke Ch. J. said that in the time of Ld. Dyer and Wray, and in all his own time, the party was never bailed on an *audita querela*, where it was grounded on a matter of fact, as upon the statute of usury and the like; for should he be bailed in such cases, every man may be defeated of his execution.

[5. If *A. hath judgment in debt against B* in which action *C.* was bail for B. and after *B. pays to A. the money recovered*, and after *A. sues out a capias (\*) ad satisfaciendum against B.* and after *bath judgment against C.* the bail, *C.* shall not have an *audita querela* upon this matter, because this is but a naked matter of fact, scilicet, the averment of the payment by the principal, and upon a *naked matter of fact* no *audita querela* lies. Trin. 3 Jac. B. R. between *Randall and Ognel*, by all the justices, præter Tanfield.]

[6. If a man be *bound to another in a statute merchant*, and puts it in the hand of a stranger upon certain conditions, scilicet, *to stand to the award of another*, and he awards accordingly, and this is performed, yet an *audita querela* does not lie upon this matter without a specialty. 43 Ed. 3. 28.]

[7. If *two* are in execution upon a judgment, *quod unica fiat executio*, and *one is discharged by letter of the dettee to the sheriff*, upon which the sheriff sends to the gaoler by his warrant to deliver him, upon which he is let at large, the *other may have an audita querela* upon this matter. P. 2 Jac. B. *Harman's Case*, per Curiam.]

[8. If *A. be in prison* upon an execution for damages recovered by *B.* and after *A. purchases a manor*, to which manor *B. is a villein regardant*, *A.* shall have an *audita querela* upon this matter in fact, without a writing. 41 Ed. 3. *Audita Querela* 18. per Curiam.]

[9. If the *conusor infeoffs several men of several parts of the land*, and after the *conusee sues execution of the statute against one*, he shall have an *audita querela* upon this matter. 33 Ed. 3. *Audita Querela* 38. Co. 3. Sir William Herbert. 14. b.]

ed of one acre, and the *conusee sues execution*, there no *feoffee*. nor the *heir by himself shall be charged with the whole execution*, but every one shall be contributory. Br. *Audita Querela*, pl. 44. cites 48 E. 3. 5.

Fitzh. *Audita Querela*, pl. 36. cites S. C.

[ 340 ]  
Noy 41. S. C. & S. P. seems to be admitted, the doubt there being

Roll Rep. 384. pl. 5. Trin. 14. Jac. B. R. Coke Ch. J. said that in the time of Ld. Dyer and Wray, and in all his own time, the party was never bailed on an *audita querela*, where it was grounded on a matter of fact, as upon the statute of usury and the like; for should he be bailed in such cases, every man may be defeated of his execution.

See (E) pl. 17. S. C. in

\* Fol. 311.

the notes there.

Br. *Audita Querela*, pl. 1. cites S. C. — Fitzh. *Audita Querela*, pl. 16. cites S. C.

F. N. B. 204. (F) says, the *conusor* may enter and seize the *conusee* without such

suit, and the marg. of the English editions cites S. C.

If the *conusor* upon a statute merchant *aliens to several, and disfeists*

*But if the confuser himself had been alive and put in execution, he should not have made any of the others to be contributory with him, but should suffer the execution against himself alone; per Cur., which case was agreed M. 25 H. 8. and that he who is in execution alone shall have audita querela against the others to have them contributory to him; quod nota; and concordat Fitz. Audita Querela 19.*

Where the confuser sues execution against one of the feoffees of the confuser upon a statute merchant where there are several, he shall have audita querela to compel him to sue execution equally against all; contra where he sues execution of all against the confuser who made the recognizance; note the diversity. Br. Audita Querela, pl. 13 cites 9 H. 4. 4. — Br. Statute Merchant, pl. 11. cites S. C. — E. N. B. 103. (B) S. P. accordingly.

If the confuser makes feoffment to divers men, and the confuser sues execution of the land of one of them only, he may have audita querela the confuser to sue execution against the other feoffees by contribution; quere. Br. Statute Merchant, pl. 49. cites 13 H. 7. 22.

If a man s'fid of 20 acres is bound in a statute merchant, and makes feoffment of 15 to several persons, and execution is sued against one of the feoffees, he shall have audita querela upon his demise to have the other feoffees to be contributory with him, but if execution be sued against the confuser himself, he shall not have such contribution; for this is upon his own act. Br. Audita Querela, pl. 39. cites 25 H. 8. — S. C. cited Br. N. C. pl. 71. — S. C. cited 2 Bull. 15.

[ 34<sup>r</sup> ] The confuser of a statute infeofed A. and B. of several lands; the land of A. is [ 34<sup>r</sup> ] extended, and he brought an audita querela against B. to have contribution; he pleaded in abatement the omission of the lands in possession of C. sed non allocatur; for the plaintiff is not bound to take notice of that, but every one grieved may have an audita querela. D. 331. b. pl. 24. Pasch. 16 Eliz. Anon.

When it is said, that if the one purchaser only is extended for the whole debt, he shall have contribution, the meaning is not that the others shall give or allow any thing to him by way of contribution, but that the party, who alone is extended for the whole, may by aud. quer. or sci. fa. as the case requires, defeat the execution, and thereby be restored to all the mesne profits, and compel the confuser to sue execution of all the land, and by this means every one will be contributory, viz. the land of every tenantant will be extended equally. 3 Rep. 14. b. in a note of the reporter in Sir William Herbert's Case. — But this is altered now by the statute of 16 & 17 Car. 2. cap. 5. and made perpetual by the 22 & 23 Car. 2. cap. 2. which enacts, That when any judgment, statute, or recognizance shall be extended, the same shall not be avoided or delayed, for that part of the lands extendable are omitted out of such extent, saving always to the parties whose lands are extended, their remedy for contribution against such persons whose lands shall be omitted. Provided that this act extend only to statutes for payment of monies, and to such extent as shall be within 20 years after the statute, recognizance, or judgment had.

Cro. C. 443. pl. 14. Hill. 11 Car. B. R. Corbet v. Barnes, S. P. and seems to be S. C. and adjudged accordingly. — Jo. 377. pl. 6. S. C. and held accordingly.

[10. If A. and B. commit a battery upon C. and after C. sues A. in Banco, where he hath judgment for 20l. damages, and after C. sues B. in B. R. and there has judgment against him for 100l. damages, and takes B. in execution, and after acknowledges satisfaction in Banco to A. of the said judgment, B. may have an audita querela thereupon, and discharge himself out of execution, because this was but a trespass, and he ought to have damages but once, as if he had released to one, the other should have had advantage thereof. Hill. 11 Car. B. R. between Baylies & alios, contra Barnes, adjudged upon a demurrer, intratur Trin. 11 Car. Rot. 359. but after, by assent, the demurrer was waved, and issue taken whether there was a mesne trespass.]

11. The alienee was in execution alone, and he restored to the mesne issues, and the execution avoided, and the alienor put in execution. Br. Audita Querela, pl. 46. cites 23 E. 3. and Fitzh. Execution, 127.

12. Audita Querela upon an indenture of defeasance of a statute merchant; the defendant pleaded variance between the statute and the defeasance, that the name of Rich. Ty. the plaintiff, was not well nor plainly wrote, and because there was intendment enough that it was one and the same person, and also the defendant had taken exception to the matter before, and this is only to the form, therefore per judicium he was ousted of the exception; quod nota. Br. Variance, pl. 105. cites 46 E. 3. 33.

12. In *scire facias* upon a recognizance, the *sheriff* returned *pro* defendant *nihil*, and the plaintiff had execution at his peril, and if the defendant had released, he should have had *audita querela*; per Hank. Br. *Audita Querela*, pl. 14. cites 12 H. 4. 4.

14. A. seised of the manor of W. acknowledged a *statute merchant* to B. and then sold the manor to J. S. Afterwards B. released to J. S. all right, title, interest, and demands &c. and all actions, suits, and executions &c. which he, his heirs &c. then had, or might have, against J. S. for or concerning the premises. An execution was sued against J. S. who brought *aud. quer.* and had judgment. Cro. E. 40. pl. 2. Trin. 27 Eliz. C. B. Hyde v. Morley.

And. 133. pl. 182. S. C. agreed by all the justices that *aud. quer.* lies.

15. *Audita querela* to avoid execution of a judgment supposed, that J. T. and the plaintiff as his surety, was bound in an obligation of 200l. for the payment of 100l. upon which, debt being brought, and judgment had, J. T. entered into a new bond for the payment of 110l. at another day, which was in satisfaction of the judgment which the plaintiff accepted. Resolved, such a bare surmise, which is but matter of fact, is not sufficient to avoid a judgment. Cro. J. 579. pl. 8. Trin. 18 Jac. B. R. Lutterford v. Peter le Mayre.

An *audita querela* brought, and the case was, this B. [the plaintiff] and M. were bound to K. and K. makes a bond to M. in the sum of 100l.

that if M. be not sued upon the first bond, then that shall be void; the plaintiff alleged, that K. did not sue him and M. and that he had no notice of the 2d bond that he might have [ 342 ] pleaded it, and so pretends that the second bond should be a defeasance of the first, and judgment was given for the defendant. Brownl. 29. Trin. 18 Jac. Bird v. Kirtton.

**(G) By what Court it may be granted.**

[1. **NO** *audita querela* may be granted by the *Chancery*, unless the record upon which it is granted be there. My Reports, 14 Jac. Piers.]

Roll Rep. 38. pl. 5. Morten v. Morrice, S. C. & S. P.

by Coke Ch. J. — Mo. 850, 851, pl. 1153. Moslyn v. Pierce, S. C. & S. P. by Coke

[2. As upon a judgment in B. R. no *audita querela* may be granted in Chancery. My Reports, 14 Jac.]

Or upon a judgment in any other Court no

*aud. quer. lies*; per Coke Ch. J. Mo. 851. pl. 1153. in Case of Moslyn v. Pierce. — Roll Rep. 383, 384. S. C. & S. P. per Coke Ch. J. — 2 Bulst. 10. Mich. 10 Jac. Williams J. said that there is no book in the law to warrant such proceedings that upon a judgment given in any of the King's Courts, an *aud. quer.* should lie, and a sci. in thereupon returnable in Chancery, but only in the same Court where the judgment was given, they having the best knowledge of all the proceedings in the same case; and to this all the Court agreed clearly. 2 Bulst. 10. Mich. 10 Jac. in Case of Scriven v. Wright.

[3. But if a *statute merchant* or *staple* be in Chancery, an *audita querela* may be there granted. My Reports, 14 Jac.]

Roll Rep. 383. S. C. & S. P. by Coke Ch. J.

S. P. by Williams J. and agreed to by all the justices. 2 Bulst. 10. Mich. 10 Jac. — S. B. accordingly by Doderidge J. Arg. 3 Bulst. 307, 308. Mich. 1 Car. B. R.

4. It was agreed, that in debt upon tenor of a record certified in Chancery by certiorari, and sent into Bank by mittimus, where the

the plaintiff declares there upon tenor of the record, that *he* may well do it notwithstanding that the *record itself, upon which he declares, be in York*, where the recovery was, and no mischief; for per Martin, if execution be sued after at York, the defendant may plead this recovery here in bar, and if judgment be given here before execution made at York, the defendant may have writ here sent thither comprehending the matter, commanding them to cease from execution, and if execution be made in the mean time, he shall have the audita querela. Br. Audita Querela, pl. 20. cites 7 H. 6. 19.

S. C. cited accordingly. 5. Audita querela upon a statute merchant shall be directed to the justices of C. B. but upon a statute staple it shall be to the Chancellor. Le. 141. in pl. 195. D. 332. a. pl. 24. Hill. 16 Eliz. Anon.

Hill. 30 Eliz. C. B. Dudley v. Lacy; but in that case, though the audita querela was upon a statute merchant, the Court was clear of opinion that the party might sue in which of the Courts he would.——Le. 303, 304. pl. 427. Trin. 31 Eliz. C. B. GLANVIL v. MALLARY audita querela upon a statute staple by an infant, was brought in C. B. and it was objected for the defendant, that C. B. ought not to hold plea in this matter, because there was no record of this statute in this Court; but on the side divers precedents were shewn to the contrary, and thereupon it was adjudged that the action well lies in this Court.——Cro. E. 208. pl. 3. Mich. 32 & 33 Eliz. Clavel v. Mallaroy, S. C. resolved that it lies in C. B. and in B. R. as well as in Chancery, for the Chancery has no more record of it than those courts, for the statute remains with the parties.——And. 227. pl. 244. seems to be S. C. and held accordingly.

Conuser of a recognizance of a statute staple to G. 6. An audita querela was brought in this Court, but because the record was not brought into Court, so as the party might have execution, if the matter was found for him; the judgment was that [ 343 ] querens nihil capiat per breve. Cro. E. 33. pl. 15. Trin. 26 Eliz. B. R. says, that a precedent was shewn to the Court, which was Mich. 5 H. 5. *infessed several of several parts of his land severally.* G. sues execution against one only, returnable in Chancery, who brought audita querela in C. B. It was moved that it ought to have been brought in Chancery, because there is no record of it in C. B. But per Cur. it may well enough be brought in C. B. Noy 71. Galscoyne's Case.

7. If a man sues execution upon a statute merchant, and hath a *capias returned in C. B.* if the feoffees or parties will sue an audita querela, they ought to sue the same out of the Chancery, directed unto the justices of C. B. F. N. B. 104. (S)

\* [These words are neither in the English editions nor in the French, but seem necessary, and the sense not perfect without them.] 8. If a man be bound in a recognizance in C. B. and afterwards [\*the conusee] doth release unto the party, and then against his release sues execution, then he shall there come into C. B. and shall sue an audita querela thereupon out of the Rolls. F. N. B. 105. (B)

And so if one recover in C. B. or B. R. debt or damages, and afterwards by his deed releases the same, and afterwards sueth forth execution upon the recovery; the party to whom he released shall have audita querela out of C. B. or B. R. where the record is, and yet he may have an audita querela out of the Chancery, and so it shall be sometimes judicial, and sometimes original. F. N. B. 105 (B)



(H) *Who shall have it. Against whom. And who not.*

[1. IF an extent upon a statute merchant be sued against one feoffee, where the condition of the defeasance is not broken, the feoffee shall have an audita querela. 46 Ed. 3. 27. b. 28.]

Br. Audita Querela, pl. 1. cites S. C. Fitzh. Audita Querela,

pl. 16. cites S. C. [but I do not observe S. P. in either of those books.]

[2. If the bail in an action be taken in execution for the principal debt, where the principal hath paid the money between the verdict and judgment, the bail shall have an audita querela. My Reports, *Morsten v. Peers.*]

See (E) pl. 17. S. C. and the notes there.

[3. If the lands of J. S. one of the feoffees of J. D. are extended upon a statute acknowledged by the said J. D. and not the lands of the other feoffees, so that J. S. hath title to have an audita querela, and after he levies a fine of the land so extended, it seems that this conusee of a fine shall have an audita querela to avoid the extent. Dubitatur M. 10 Jac. B. R. between *Mulleneux v. Erle.*]

Fol. 312.

2 Bulst. 14. Erle v. Mulleneux, S. C. and ibid. 17. adds a note, That the judges did

not argue this case, nor delivered any positive opinion therein, inasmuch as the parties had agreed the matter in difference between themselves; and so this case was cast out of the Court, and went sine die; but by Haughton J. and the rest of the judges agreeing with him, the feoffee here did take the land with the charge thereon, and therefore he cannot have this audita querela, unless the first extent had been had against him, then he might well have had this audita querela for his remedy herein, and so to have contribution; but here in this principal case it is not so, because the first extent was had against the conusor before, and therefore the conusee not to have this audita querela; and so though the opinion of the Court was against the plaintiff, yet no judgment was given herein, because the matter was ended by agreement between the parties. Quod nota.

4. It lies for the grantee of a reversion with atornment &c. and there he shall have account ab initio, cites 6 E. 3. 53. *Charleston's Case*, and 25 E. 3. 53. *Venner's Case*. F. N. B. 104. (G) in the new notes there (c).

5. If conusor upon a statute merchant aliens part of his land, and execution is sued against the alienee, he shall have audita querela to make the conusor to be contributory; but if the conusor himself was in execution, he should not have contribution of the alienee. Br. Suit, pl. 10. cites 23 E. 3. Fitzh. tit. Execution 127. and ibid. 255, 256. and 29 E. 3. 7. and 29 E. 3. 39. accordingly. [ 344 ]

6. If one acknowledges a statute, and afterwards acknowledges a 2d statute, the 2d conusee shall have a scire facias against the first to receive the monies which are to be levied, if the tenant of the freehold will not sue. F. N. B. 104. (G) in the new notes there (c), cites 38 E. 3. 12.

7. Note that a conusor infeoffed a feme of parcel of his land, and J. N. of the rest, and the conusee sued execution against the feme, who brought audita querela, and had writ against the conusee and J. N. to say why his land should not be put in execution, and J. N. shewed acquittance of the conusee, and the Court said they had no warranty to hold plea between the conusee and the said J. N. and

*and this writ by the feme ought to have been sued against the conusee, to say why he should not recover the land and the issues; and also they may grant out of this audita querela a venire facias, and execution shall be spared, and then the conusee shall answer to him who has the acquittance. Quod nota, that he who is in execution shall have writ against the other tertenant to be contributory, and he shall have writ upon his acquittance against the conusee; but it was said P. 36 H. 8. that the conusor himself shall not have such contribution. Br. Audita Querela, pl. 2. cites 45 E. 3. 17.*

Fitzh. Audita Querela, pl. 15. cites S. C. & S. P. accordingly.

—F. N. B. 104 (E) S. P. And that he need not name him that sued the execution, if he has matter in writing for to sue &c. —See (D) pl. 6. contra, and the notes there.

*And so see that the bailiff nor the procuror shall be compelled to answer in this action; for the nature of this action is no other but to avoid the execution, and the bailiff or the procuror ought not to have execution; quod nota; and so see audita querela upon matter in fact, and against him who has the land in execution, tho' he was not party to the record; for this is all to avoid the execution. Ibid.*

\* [The English editions are (recognizee), and therefore wrong.]

9. The heir of the \*recognisor may sue an audita querela, if he has matter in writing to discharge the execution. F. N. B. 104 (B)

10. A stranger, who made not the recognizance, was tenant of the land at the time of suing forth of the execution, shall have an audita querela, if he have matter of discharge in writing. F. N. B. 104. (G).

[ 345 ] 11. In audita querela the case was; A. and B. seised of capite lands, and C. seised of soccage lands. They all 3 acknowledged a statute of 8000l. to D. A. and B. levied 2 several fines of their moieties to V. and W. to the use of themselves and their heirs, until default if payment was of certain annuities, and then to the use of V. and W. They, after default of payment, sold the lands to H. and J. H. released to J. who devised the land in tail, and died. The devisee in tail died without issue. The wives of the plaintiffs were heirs to J. to whom the 3d part of the capite lands descended. D. had extended the lands upon the statute, before the default of payment of the annuities, and before the bargain and sale; and although he sued the extent against A. and B. and also C. yet the sheriff extended the lands of A. and B.: and to defeat the extent, and to have restitution, because the land of C. was not also extended, the audita querela was brought. The principal point in this case was; if the bargainee and those which claim under him should have an audita querela for the extent made before their time, or that the bargainor having the first cause of action had extinguished it by the sale of the land. Another point was, if the coheirs should have an audita querela without the owner of the two parts, all of them being tenants in common, and equally grieved with the extent.

**Extent.** The case is argued, but not resolved. Mo. 661. pl. 906. Mich. 44 & 45 Eliz. in Canc. Heydon v. Smith.

12. In what case *vouches in a præcipe quod reddat* shall have audita querela to be restored to the land lost. See Jenk. 100. pl. 95.

13. A. seised of bl. acre and wh. acre, acknowledges a statute, and then makes a lease for years of wh. acre, the remainder over in fee; then the *conusee purchased bl. acre*, and extends the land of lessee for years. *He in remainder shall have audita querela for the damnification which came to his interest*; per Barkley J. Mar. 71. Mich. 15 Car.

And per Barclay J. he that has but *interesse termini* shall have audita querela, and that one *jointenant only*

shall have it, and not abateable by death of any other. Mar. 71. pl. 108. Mich. 15 Car. in Case of Beake v. Dawes.

14. *Cesty que use before the statute* might have an audita querela; per Barkley J. Mar. 71. Mich. 15 Car.

### (I) Against whom it lies.

[t. IF 2 executors sue execution for damages recovered by the testator, where one hath released, an audita querela lies against both. 21 Ed. 3. 13. b.]

2. Audita querela does not lie *against the King*, therefore the matter shall be pleaded. Br. Audita Querela, pl. 34.

Br. Charters de Par-don, pl. 4. cites 34 H. 6.

2. & 50. and 35 H. 6. 1. 2c. — Audita querela does not lie against the King, but against the *informer* he shall have it. Roll Rep. 95. pl. 41. Mich. 12 Jac. B. R. Shoyne Qui tam &c. v. Dr. Foster. — 2 Bulst. 324, 325. S. C. but being after judgment an audita querela against the informer will not hinder the execution as to the King; per Coke Ch. J. — Audita querela lies not against the King. Noy 26. Mich. 15 Jac. C. B. Ford v. Mead. — Jenk. 109. in pl. 10.

3. Audita querela lies as well upon matter in fact as upon matter in writing, and lies where A. and B. came before the mayor &c. and B. acknowledges himself to be bound in 100l. to A. in the name of C. before the Mayor, and affirms his name is C. and afterwards C. is arrested by force of this bond and statute, and taken in execution; now C. shall have audita querela against A. and B. F. N. B. 102. (H).

4. If the conusee [after execution] has assigned [or leased] but a part of his estate, the scire facias shall be brought against the conusee only, and not the lessor [lessee]. Quære. But if he assigns the whole, and the assignee levies the whole, or the plaintiff will pay the residue, the writ lies against the assignee alone, and he shall retake (or repay) the monies; but if he has levied the whole, and afterwards assigns, the writ lies against both. F. N. B. 104. (G) in the new notes there (c) cites 50 E. 3. \* 46, or 16. 38 E. 3. 12. 21 E. 3. 1. 46 E. 3. Scire Facias 134. 15 E. 3. Respond. 3. But one of them may answer his companion, and yet the conusee may release, notwithstanding the assignment. Vide ibid. See also 17 Aff. 52. 9 E. 4. 13. 12 H. 8. 8. 18 E. 3. 25. contra. 17 Aff. pl. 24. contra. 25 Aff.

\* There are not so many pages; but the Case is 50 E. 3. 16. a. pl. 7.

Aff. 8. 17 E. 3. 43. 4 H. 6. 72. 21 E. 3. 46. contra. See 17 E. 3. 49.

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(K) [Against whom] jointly.

Br. Brief,  
pl. 80. (81)  
cites S. C. &  
S. P. obiter.

[1. IF a statute be acknowledged to two, of which one is an infant, and they make a defeasance, and after sue execution contrary to it, an audita querela shall be brought against both; for it does not appear within the deed that he is an infant. (Also the deed of the infant is not void, and peradventure he will affirm it.) 48 Ed. 3. 12 b.]

Br. Brief,  
pl. 80. (81)  
cites S. C.  
& S. P. says  
that the deed  
of the baron  
was a suffi-  
cient dis-  
charge of  
the whole  
statute, and

[2. [So] If a statute be made to baron and feme, and they make a defeasance, and after sue execution contrary to it, the audita querela shall be brought against both, altho' the defeasance be void as to the wife; for this action is in lieu of an answer of the execution which is sued by both, and this is all one as if the baron alone had made the defeasance, which would have been a sufficient discharge. Contra 48 Ed. 3. 12.]

therefore the audita querela shall be against the baron only; but because it was against the baron and feme, and the defendant pleaded it to the writ, the best opinion was that the writ shall abate, because the deed appears ill in itself. Br. Audita Querela, pl. 11. cites S. C. and S. P. accordingly. —Br. Baron and Feme, pl. 24. cites S. C. & S. P. by Finch, that peradventure the law shall be so.

[3. Vide 11 Ed. 4. 8. b. An audita querela was brought against baron and feme and a third person, upon an execution upon a statute by them, and admitted good.]

Br. Audita  
Querela, pl.  
11. cites

S. C. & S. P.  
by Finch.

—See pl. 7.

—See (E)

pl. 4. S. P.

Br. Audita

Querela,

pl. 11. cites

48 E. 3. 12.

[4. If a statute be acknowledged to two, and one makes a defeasance, and after both sue execution, it seems the audita querela lies against both; for it is a discharge of the whole, and this is in lieu of an answer to the execution (for the execution cannot be defeated against him who did not make the defeasance, if he be not joined). Contra 48 Ed. 3. 12. b.]

[5. If two consuees make a defeasance for them and each of them, the audita querela may be brought against one only. 48 Ed. 3. 13.]

S. C. and S. P. by Finch.

[6. If a statute be acknowledged to one, and a defeasance made by him, if the audita querela be brought against the consuee and a stranger, the writ shall abate. 48 Ed. 3. 13.]

Br. Scire

Facias, pl.

183. cites

S. C. but

S. P. does

not clearly

(K) pl. 4.

[7. If a statute be acknowledged to two, and one releases, and after they both sue execution, the audita querela may be brought against both. 11 Ed. 4. 8. b.]

appear; but seems admitted. —Br. Default &c. pl. 94 (95), cites S. C. —See

[8. So the audita querela may be brought only against him that released. 24 E. 3. 27.]

[9. If a statute be acknowledged to a feme sole and J. S. and after the feme takes baron, and J. S. releases, and after execution is sued; the audita querela may be brought against the baron and feme, and J. S. 11 Ed. 4. 8. b.]

10. *G. acknowledges a statute merchant to W. and afterwards infroffed W. of part of his land, and the residue he gave to H. his son, and H.'s wife in tail; W. sued execution against H. who alone without his wife brought audita querela, and well.* D. 193. b. pl. 30. Mich. 2 and 3 Eliz. Gascoigne v. Whalley.

Bendl. 80.  
pl. 124.  
S. C. ad-  
[ 347 ]  
judged.—  
Mo. 44. pl.  
134. S. C.

Dal. 43. pl. 29. S. C. in totidem verbis with Mo. but neither of the books above do mention the S. P. as Dyer.

11. *Audita querela by three persons to avoid executions, which were at the suit of several persons; adjudged to be vacated, because one aud. quer. cannot be for several suits.* Mo. 354. pl. 479. Pasch. 36 Eliz. Collins's Case.

12. *In audita querela to avoid execution on a statute, outlawry in one of the plaintiffs was pleaded. The question on a demurrer was, if it might be pleaded in that suit which is only to be discharged, and not to recover any matter, but was ruled a good plea; whereupon the other plaintiff prayed summons and severance, so that he only might sue; and per omnes J. præter Walmesley, he might well have it, because they only sue to be discharged, wherefore the nonsuit of the one shall not prejudice the other; besides it is to discharge their land, and it is not reasonable that the act of one should make the other's land to be charged; but Walmesley doubting, adjournatur.* Cro. E. 448. pl. 15. Mich. 37 & 38 Eliz. C. B. Worsley v. Charnock.

Cro. E.  
472. (bis)  
pl. 36.  
Pasch. 38  
Eliz. S. C.  
but D. P.

13. *If there are two consors, and their several lands are put in execution; they cannot join (if cause be) in an audita querela, but otherwise if they are jointenants of land.* D. 194. a. Marg. pl. 32. Pasch. 38 Eliz. C. B. Morsley v. Charnock.

One jointe-  
nant on'y  
may have  
aud. quer.  
and the  
death of one

shall not abate the writ, per Berkeley J. Mar. 71. Mich. 15 Car.

14. *In an audita querela the case was thus: The father and son were bound in a statute merchant to C. who sued out an execution against them, and their lands were severally extended; and they supposing the statute was not good, because it was not sealed with both their seals, according to the statute, they both brought a joint audita querela; and whether they could join in this action or not was the question; judgment was given that they ought to have several writs.* Ow. 106. Pasch. 38 Eliz. C. B. Worsley v. Charnock.

Cro. E. 47-  
(bis) pl. 36a.  
S. C. ad-  
judged ac-  
cordingly.—  
S. P. and  
adjudged  
that they  
ought to  
have several  
writs,  
because the  
wrong done

to one by an execution of his lands, is not any tort to the other. Noy. 1. Farmer v. Downs. [And though the case mentions (jointenants) yet it plainly intends two persons jointly bound only.]

15. *If 2 are severally bound in 2 several statutes, and afterwards the recognissee by deed doth release both the statutes to one of them, if he sues execution against them severally, they shall join in audita querela upon that release.* F. N. B. 104 (M).

16. *It seems the tenants in common &c. need not join in an audita querela with the tertendants.* 20 E. 3. Quære. F. N. B. 104. (M) in the new notes there (b).

Jo. 377. pl.  
6. S. C.  
held accord-  
ingly.

17. Audita querela was brought by *A. B. and C. to avoid a judgment against them in trespass, where A. only was taken in execution upon this judgment, B. and C. not being touched. It was objected that A. who was in execution ought to have brought the audita querela alone, and that B. C. who had not been grieved, ought not to join with him, sed non allocatur; for they being parties to the judgment, and liable to the execution, tho' never had against them, yet for their indemnity they may well have an audita querela, and join with him who is in execution.* Cro. C. 443. pl. 14. Hill. 11 Car. 2. B. R. Corbett v. Barnes.

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## (L) Bars of an Audita Querela.

Br. Audita  
Querela,  
pl. 5. cites  
S. C.—

Br. Feoff-  
ment de

Terres, pl. 6. cites S. C.

[1. IF the *conusor* hath right to have an audita querela against him who hath the land in extent, and he enters upon him; and makes a feoffment to another, whose estate comes afterwards to the extendor, the audita querela is extinct. 46 Ed. 3. 30. b.]

Br. Audita  
Querela, pl.  
5. cites  
S. C.—

Br. Feoff-  
ment de

Terres, pl. 6. cites S. C.

[2. So if the feoffment had been upon condition to render it up, and he does it accordingly, although the extendor does not come to the land, yet by the feoffment this audita querela is extinct, and not revived; contra 46 Ed. 3. 30. b. 31. admitted.]

Fol. 313.

[3. But there it is admitted 31, that if the extendor had the estate in the mean time, between the feoffment and the rendring up, the audita querela had been gone.]

\* Fitzh.  
Judgment,  
pl. 183.  
cites S. C.

† Fitzh.

Audita Que-

rela, pl. 21. cites S. C.

† Fitzh. Audita Querela, pl. 11. cites S. C. & S. P. but says that in the second he shall not have superideas to the sheriff to stay execution, as he might have in the first.—Br. Audita Querela, pl. 22. cites S. C. accordingly; and S. P. as to the superideas, by the reporter.—F. N. B. 104. (O) S. P.—But if a man sues an audita querela upon a release, and afterwards is nonsuit, he shall not have an audita querela upon new matter, ut dicitur 43 E. 2. but it seemeth the law is otherwise, but he shall not delay execution by a new audita querela. F. N. B. 104. (Q.)

Br. Audita  
Querela, pl.  
31. cites  
S. C.—

Fitzh. As-  
sise, pl. 251.  
cites S. C.  
—See (C)  
pl. 6.

See (E) pl.  
2. the like  
point.

[5. If the *conusee* of a statute delivers the statute to the *conusor* in lieu of an acquittance, and after sues execution, and the *conusor* comes and prays a re-extent, because the land is extended too low, and this is done accordingly, he shall never avoid this extent by an audita querela, because when he prayed a re-extent, he admitted the statute extendible and executory. 43 Ass. 18. adjudged.]

[6. If the acquittance upon which the audita querela is ground-  
ed does not agree with the statute which is to be discharged, but is

To variant that it cannot be the same, the audita querela shall be disallowed. 18 E. 3. 58. b. adjudged.]

\*[7. But if the plaintiff in the audita querela grounds his suit in Chancery upon an indenture, yet he may in Banco maintain it upon a payment by deed. 18 Ed. 3. 58. b.]

[8. So, although the payment was after the writ brought. 18 Ed. 3. 58. b.]

9. If a man sues audita querela upon an indenture, and relinquishes it, he shall not have another audita querela upon other matter; for he shall not change his matter; per Thorp and others, quod nullus negavit. Br. Audita Querela, pl. 1. cites 43 E. 3. 7.

10. Audita querela by the heir of the *conusor* against *tertenant*, who said that the heir himself, now the plaintiff, after the death of his father, infeoffed this defendant; and so he is in by feoffment, and not by statute, and the plaintiff was compelled to answer to it. Br. Audita Querela, pl. 5. cites 46 E. 3. 30.

11. A. recovered in debt against B. and after released to B.— [ 349 ]  
A. sued *capias ad satisfaciendum* against B. and pursued the same till B. was outlawed. Anderson Ch. J. held, that audita querela lies notwithstanding this outlawry, and if the audita querela pass with B. the outlawry shall be avoided. 2 Le. 175. pl. 215. Mich. 30 Eliz. C. B. Edgar v. Crisp.

12. In audita querela to avoid execution upon a statute it was surmised, that the *conusor's* father was seized of lands, and levied a fine of them to the use of himself for life, and after of part of them to the use of the plaintiff in tail, and of the residue to the *conusor* in fee. It was adjudged, that this purchase in this manner was a sufficient discharge of the statute. Cro. E. 756. pl. 22. Pasch. 42 Eliz. B. R. Humphrey v. Heneage.

13. If a writ of aud. quer. be brought by the defendant in the former action to discharge himself of an execution, a release of actions personal is a good bar, because he is to discharge himself of a personal execution. Co. Litt. 289. a.

14. In aud. quer. the plaintiff declared, that he being in execution upon a *capias utlagatum* at the suit of the now defendant, the sheriff suffered him to go at large. The defendant pleaded, that after the said escape, and before the aud. quer. brought, the said writ of *capias utlagatum* issued, and was returned *non est inventus*, and thereupon the now plaintiff at the day of the return appeared and upon oyer of the exigent reversed the outlawry, because it had an uncertain return, & sic dicit, quod non habetur aliquod tale recordum; and adjudged upon demurrer that aud. quer. does not lie. 8 Rep. 141. b. Pasch. 8 Jac. Dr. Drury's Case, alias Bray v. Drury.

15. Outlawry is good plea in audita querela; resolved per tot. Cro. J. 125. pl. 11. S. P. Cur. after several arguments at bar. Sid. 43. pl. 1. Trin. 13 Car. 2. C. B. Jafon v. Kete. adjudged accordingly. Pasch. 15

Jac. B. R. Griffith v. Middleton.—S. C. cited as adjudged. Palm. 191.—Jenk. 106. pl. 2. S. P. accordingly.—Ibid. 126. pl. 55. S. P. accordingly; for the aud. quer. is to defeat the execution, and not to reverse the judgment.—Mod. 224. pl. 13. Mich. 28 Car. 2. C. B. Higden

den v. Whitchurch, S. P. for in an audita you admit the judgment to be good, but only upon some equitable matter arising since, you pray that no execution be made upon it; Arg. and agreed per Cur.

16. Audita querela is no *superfedeas*, and therefore an execution may be taken out, unless a *superfedeas* be sued forth, and if the audita querela be *founded on a deed*, it must be proved in Court before a *superfedeas* shall be granted. 1 Salk. 92. pl. 1. Mich. 3 W. & M. in B. R. Langston v. Grant.

(M) In what Cases a Bar against one shall be against the other.

Fitzh. Audita Querela, pl. 21. cites S. C. — See (H) pl. 3.

Fitzh. Audita Querela, pl. 21. cites S. C.

[1] IF the *conusor* of a statute *aliens part* of the lands after a *release made of the statute by the conusee*, and after the *conusee* sues execution against the *conusor*, and he sues an *audita querela*, and is *non suit* therein, this shall not be any bar of the audita querela of the *feoffee*, for he may have one also. 17 Ed. 3. 27. 35.]

[2. But it had been otherwise if the alienation had been after the *non suit*, for then he comes in under the charge. 17 Ed. 3. 27. 35.]

[ 350 ] (N) In what Cases a Discharge for one shall be for the other.

[1. IF several acknowledge a statute, and one discharges it against himself by audita querela for infancy, this does not discharge he others also. 18 Ed. 3. 58. b.]

## (N. 2) Proceedings.

Br. Audita Querela, pl. 41. cites S. C. — Ibid. pl. 15. cites 12 H. 4. 6. and 15. S. P.

1. IN audita querela process against the *conusee* is *venire facias*, and if he does not come *distress infinite*; per Cur. Quod nota bene. Br. Process, pl. 142. cites 24 E. 3. 30.

2. *Distingas* upon audita querela was *abated for false Latin*, quod dicitur mirum ibidem, and *new distress* shall issue, and *new venire facias*; for it was after issue and *venire facias* returned; quod nota. Br. Process, pl. 75. cites 24 E. 3. 35.

3. In audita querela, the defendant made default before plea pleaded, the plaintiff shall not go quit of execution, but shall sue *distingas ad respondendum*; but after that the parties have pleaded plea in judgment, and the defendant makes default, then the defendant shall have *distingas ad audiendum judicium suum*; and per Finch the plaintiff shall not recover damages in this action, but where he is to be ousted of his land, and as here the mainprize shall not



not be discharged, notwithstanding the default of the defendant.

Br. Audita Querela, pl. 7. cites 47 E. 3. 1.

4. In audita querela the plaintiff came, and the defendant not, by which the plaintiff prayed to go quit, & non allocatur; but distress awarded *ad respondend.* Br. Process, pl. 160. cites 47 E. 3. 1.

5. In audita querela, where the defendant was taken by the execution of the statute and imprisoned, and the sheriff returned *petit issues*, and prayed *capias* for the mischief, and could not have it; and the opinion of the Court was that he may sue *sicut pluries*, and upon this *shall go quit*, quod nota; and the plaintiff prayed to go by mainprize, and could not, per Cur. till he had given some answer. Br. Audita Querela, pl. 10. cites 48 E. 3.

Br. Process, pl. 129. cites S. C. — The plaintiff would have been by mainprize, and could not before

the venire facias returned, quod nota. Br. Audita Querela, pl. 9. cites 47 E. 3. 25.

6. 11 H. 6. cap. 10. enacts that where persons taken for execution of recognizances of the staple, come in by writs de corpus cum causa in Chancery, shewing forth divers indentures, and other things in default, desiring writs of scire facias to warn the parties at whose suit they be taken, and by surety found to the King have been delivered, from henceforth such sureties shall be made severally, as well to the King as to the parties.

7. If execution be not made by a statute merchant, the process upon the audita querela shall be *venire facias*: but when execution is made, and the process shall be *scire facias*; for upon the *venire facias* shall issue *distress infinite*, which is a long delay to him who is in execution; but *scire facias* is more short; [ 351 ] quod nota per Cur. Br. Audita Querela, pl. 21. cites 22 H. 6. 56. and 15 E. 4. 5.

Where an audita querela is brought by person actually in execution or at large, if he founds his

writ upon some deed of the other party, in both these cases a *scire facias* is the process, per Cur. Carth. 303. Pasch. 6 W. & M. in B. R. Clerk v. Moor.

But where it is brought by a person at large, and upon a bare suggestion of matter of fact, there the only process is a *venire facias*, and upon that a *distress infinite*, per Cur. Carth. 303, 304. Clerk v. Moore. — 1 Salk. 92. pl. 2. S. C. says nothing of the writ being founded on a deed, but says that where the suit is quia timet and the party at large, the proper process is *venire*, and *distress infinite*; but where the party is in execution, there he may either have a *scire facias* or a *venire facias*; and that Co. entries 88. is the only *scire facias* on a matter en pais, whereas the party was not in execution.

Where an audita querela is founded on a record, or the party is in custody, the process upon it is a *scire facias*; but if founded on a matter of fact, or the party is not in custody, the process is a *venire*. 1 Salk. 92. Hill. 10 W. 3. B. R. Anon. — Ibid. says that Trin. 12 W. 3. B. R. it was held so again. — S. P. by Altham, Mo. 811. pl. 1097. Mich. 8 Jac. in Canc. in Case of Trot v. Sparling.

8. A man who is condemned in debt or damages, and after gets a release, he shall not have *scire facias ad cognoscendum factum* till he be taken and imprisoned, but shall have audita querela if he be at large, and so was the opinion of the Court. Br. Audita Querela, pl. 33. cites 2 E. 4. 22.

9. In audita querela against two, the default of the one at the *scire facias* in Chancery or the *venire facias* in Chancery is the default of both, and the plaintiff recovered damages. Br. Audita Querela, pl. 36. cites 11 E. 4. 8.

Br. Damages, pl. 125. cites S. C.

The distringas may be in lands and tenements, which he had the day

of the writ purchased. 18 E. 3. 36. 38 E. 3. 31. and before the distringas sued the comisee shall not be ousted. F. N. B. 104. (U) in the new notes there (a), cites 21 H. 6. 56. See 48 E. 3. 1. 31 E. 3. Aud. Quer. 24. 20 E. 3. ibid. 28. 30.

In audita querela, the course is to take bail by manuscript by recognizance, to prosecute with effect. Bull. 187. Patch. 10 Jac. in Case of Dingley v. Crayton.

10. The process in audita querela is *venire facias*, & *distringas alias*, & *pluries distringas*; and if he *return nihil*, or *non est inventus*, he shall have a *capias* against the defendant. T. 18 E. 3. F. N. B. 104. (U.)

11. If a man be arrested and imprisoned upon a statute staple, and he hath acquittance or release to discharge himself, then if he will sue an audita querela or a scire facias to avoid the execution of that statute, he ought for to give security as well to the party, as unto the King in Chancery, severally in a certain sum &c. to sue with effect, and to render his body or pay the money &c. otherwise he shall not be delivered out of prison; and the same is by force of the statute of 11 H. 6. cap. 10. F. N. B. 105. (F.)

12. Upon an audita querela the plaintiff shall have a *superseas* in the same writ to stay execution, but not in case of a nonsuit. F. N. B. 104. (O.)

13. An infant bail, if he be an infant at the time of the bail, shall be discharged by an audita querela. Jenk. 319. pl. 21.

Upon an audita querela, the bail generally ought to be put in in Court. 12 Mod. 598. Mich. 13 W. 3. in a nota.

14. In audita querela it was said by Broome the secondary, that bail must be given in Court, and not elsewhere, unless in cases of great necessity; and then it may be put in out of Court before 2 judges, and that this is the course of the Court. Palm. 422. Patch. 1 Car. B. R. Anon.

Sid. 406. pl. 16. S. C. accordingly; for audita querela is more properly a committal than a writ to empower the Court to enquire of a grievance; and if the party, against whom the complaint is, be not before the Court, we ought to proceed to examine the matter, without enquiring into the nature of the process by which he came in, because he might have appeared without process; but that in scire facias on a judgment it is otherwise.

15. In audita querela the party appeared upon the scire facias and demurred, for that the scire facias bore date before the audita querela, but the Court held that the fault was cured by the defendant's appearance; for audita querela is in nature of a mesne process to bring in the defendant to answer, and the judgment is given upon the audita querela, and therefore disallowed the demurrer. Vent. 7. Hill. 20 & 21 Car. 2. B. R. Vaughan v. Loyd.

16. Judgment against H. who rendered himself before the return of the ca. sc. but did not give the plaintiff notice of it, nor get the bail-piece discharged; and the plaintiff proceeded to judgment against the bail upon a scire facias: the Court would not relieve them upon a motion, because no exoneration was entered, and a scire facias returned, but put them to their audita querela. 1 Salk. 101. pl. 14. Trin. 12 W. 3. B. R. Lyell v. Galletly.

## (N. 3) Pleadings. The Writ and Declaration.

1. **AUDITA querela** by conusor upon a statute merchant, *super literas acquietancie*, and he shewed two releases, the one of all actions, and the other of the sum in the statute, and the party was compelled to hold him to the one release; for each goes to all; by which he held him to the general release; and the other said that this is not literæ acquietancie, judgment, &c. and because they are of one effect he was compelled to answer, quod nota; and where the writ is literæ acquietancie in the plural number, and one release is the singular number, and yet well. Br. Audita Querela, pl. 24. cites 24 E. 3. 27.

The plaintiff shall hold himself to one matter. F. N. B. 104. (R.)

2. If A. be bound in a statute merchant to B. and delivers it into the hands of J. S. upon condition, and tho' the condition be performed, yet J. S. delivered it to B. The plaintiff cannot aver the conditions against the conusor himself who is party to the statute; but where it rests in indifferent hands, there, in detinue against the bailiff, the conusor may aver the conditions of the delivery in advantage of the third person; but contra against the conusor himself, where it is in his own hands who is party, and sues execution; quod tota curia concessit; and so the opinion of all the justices was against the plaintiff. Br. Audita Querela, pl. 1. cites 43 E. 3. 27.

But per Winch, where the bailiff makes the conusance, or obliges his executors, and the statute or single obligation comes to his own hands as executor, and not as

Party, there writ of detinue lies against him, and the conditions shall be averred without shewing writing; to which Belk. who was a counsel with the conusor, agreed; for there the action of detinue is brought against the bailiff who is dead; but as long as the bailiff is alive, so that the party may have writ of detinue against him, the conusor cannot aver the conditions against the conusor without shewing writing of them; therefore as here the conusor is at no mischief, for he may have detinue against the bailiff, and recover all in damages. Ibid.

3. In audita querela upon an indenture of *desceasance of a statute merchant*, the defendant pleaded variance between the statute and the desceasance, that the name of Ric. Ty. the plaintiff was not well nor fully writ; and because there was enough intendment that he was the same person, and also the defendant had taken exception to the matter before, and this now is only to the form, therefore per judicium he was ousted of the exception; quod nota. Br. Variance, pl. 105. cites 46 E. 3. 33.

4. In audita querela he shall have *scire facias* to the party, and supersedeas for himself for the execution, and shall shew indenture of desceasance in the same writ of divers covenants, and say that he has performed them all; and there it was said that it is sufficient for the party to shew them generally, and the defendant shewed certainly which is broken; quod mirum inde; for otherwise it is pleaded in debt upon an obligation with condition, and the plaintiff cast protection, and disallowed; for he is plaintiff, and none except him can sue resummons. Br. Audita Querela, pl. 8. cites 47 E. 3. 5.

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5. Release of all actions is not sufficient to have audita querela; for execution is not released by it. Br. Audita Querela, pl. 37. cites 3 H. 4.—And concordat Littleton in his chapter of Releases, and Fitzh. tit. Release, 53. For execution is no action.

6. P. was bound in a statute merchant to W. D. who *bailed the statute to J. N. in indifferent hands, upon certain conditions performed to deliver it to D. or otherwise to P. and after D. brought writ of detinue of it against N. who prayed garnishment against P. upon the matter, who came and pleaded to issue, and at the nisi prius; and pending this, N. by covin and procurement of D. and one R. delivered it to the said D. upon which he sued execution, by which P. was taken and imprisoned, and brought audita querela, containing all this matter against all three; and Norton prayed process by capias upon it, because deceit is comprised in the writ, and could not have it without venire facias. And it was in a manner agreed by the justices, that the writ of audita querela shall comprehend all the matter above, but yet the writ is only against the conusee who sued execution, and the venire facias shall issue against him only, and not against the other two, viz. the bailiff and the procuror; but it seems that action of deceit lies against them; for the audita querela cannot lie but against him who is party to the record, unless in special case. Br. Audita Querela, pl. 15. cites 12 H. 4. 6. & 15.*

7. And per Hull, the defendant never shall make fine in audita querela; and per Hank, if the conusee upon a statute merchant sues execution, and grants his estate over, the audita querela shall be brought against the grantee. Quod tota Curia concessit. Ibid.

8. And so see that the bailee nor the procuror shall not be compelled to answer in this action; for the nature of this action is no other but to avoid the execution, and the bailiff nor the procuror have no execution; quod nota. And so see audita querela upon matter in fact, and against him who has the land in execution, though he was not party to the record; for this is all to avoid the execution. Br. ibid.

9. Audita querela upon an indenture, which was *Langa White*, and the writ was *Lang White*, leaving out the last (a), and it was amended. Quære if it shall abate for the variance, if it had not been amended, or not; for it seems that it shall, if it had not been amended; for Port. said that now lately an outlawry was reversed for this difference between Dockwra and Dockawre. Br. Variance, pl. 90. cites 21 H. 6. 7.

10. This writ shall be directed to the justices of C. B. or B. R. F. N. B. 102. (H).

11. Variance between the audita querela and the record shall abate the writ. F. N. B. 104. (R.)

12. Lands of the heir being extended upon a statute made by his father, he brought an audita querela, suggesting the lands to be entailed, and so not extendible. The defendant pleaded that they descended to him in fee, and traversed the tail. It was found that all (except 500 acres) were in fee. Adjudged that the issue ought to be found as the plaintiff pleaded in every part, otherwise it is found against him in all; wherefore it was adjudged that the plaintiff take nothing by his writ. Cro. J. 85. pl. 10. Mich. 3 Jac. B. R. Athburnham v. Ld. St. John.

13. Audita querela, to avoid a statute merchant, surmising that the mayor who took the same had not authority to take such a statute, and quod scriptum recognitum &c. was not sealed with the queen's seal

*seal of 2 pieces* provided for the sealing of statutes merchants; it was held by all the Court that either of these causes is sufficient to avoid the statute; but that the count was not good for the doubleness of it; for it ought to comprehend but one cause, or however ought to rely upon one, for doubleness is uncertainty. Cro. E. 809. pl. 14. Hill. 43 Eliz. C. B. Forest v. Ballard.

and see D. 35. a. pl. 27. of a recognizance in a statute merchant made before the mayor of Chester,

and the conusee sued execution, and the seoffee brought audita querela, supposing that the said mayor had no authority to take statutes.

14. In *audita querela* of land taken in execution, an exception was taken to a declaration for *not setting forth that the statute had 3 seals, pursuant to the statute of 23 H. 8.* yet the writ is good, because though the execution be ill, yet the audita querela lies, because it is brought only for the deliverance of the party. But otherwise it is if one sues an action upon the statute; there he ought to shew the seals precisely. But it being alleged that the statute was acknowledged according to the statute of 23 H. 8. it is intended to have all the seals. Mo. 811. pl. 1097. Mich. 8 Jac. in the Petty Bag in Chancery. Trott v. Spurling.

15. A. brought an audita querela against B. upon a recognizance of 4000 l. acknowledged to the use of his mother, and shewed that the conusor had *inseoffed him and another* of the lands, and that the conusee had *sued execution against him only*; and found for the plaintiff, and moved in arrest of judgment, 1st, because he had *not shewed* in this audita querela *when the statute was certified, nor yet the teste, nor yet the return of the writ of the extent.* 2dly, The plaintiff had not shewed himself the party grieved, because he had *not shewed an ouster*, and before an ouster no audita querela lies for the purchaser; but otherwise for the heir, as 17 Aff. 24. Hobart and Winch only present, *the liberate is an ouster of itself.* Winch. 20. Trin. 19 Jac. Sir Edward Grubham v. Sir Edward Cooke.

16. In a scire facias, in the nature of an audita querela, the plaintiff shews that Sir W. B. being seised of lands in D. and of other lands, in 3 Jac. acknowledged a statute of 400 l. and that the plaintiff had part of the land subject to the execution, and that other lands in the possession of the defendants were likewise subject, but that only those in the possession of the plaintiff were taken in execution; whereupon he brought this action to be relieved against the defendants by way of contribution. After verdict for the plaintiff it was moved in arrest of judgment, that the action was brought generally against the defendants, *without alleging that they were tenants tempore brevis, or that the plaintiff himself was then tenant*, yet being said to be to his prejudice, & minus juste, it shall be intended that he was then tenant, and the defendant not having answered that he was not tenant, but admitted him as such, judgment was given for the plaintiff. 3 Bulst. 305. Mich. 1 Car. B. R. Blackstone v. Martin.

Lat. 3. S. C. but S. P. does not appear. — Ibid. 112. S. C. & S. P. and says that the defendant pleaded that the conusor was not seised of other lands at the time of the conusance of the statute, or at any time after, unless of those of the plaintiff

which were taken in execution; but it was found for the plaintiff, and upon the exception taken the Court held the exception not good. — Ibid. 274. S. C. says judgment was given for the plaintiff. — Jo. 90. pl. 4. Blackston v. Martyn, S. C. accordingly. — Jo. 82. S. C. but S. P. does not appear. — Palm. 410. S. C. but S. P. does not appear. — S. C. cited accordingly. Mar. 69. pl. 108. Arg. — 3 Bulst. 309 in the S. C. it is said that a precedent was shewn in 33 Eliz. Morley v. Lovet, where it was shewn how he was tenant, and that he was tenant at the time of the liberate; and all this there shewed in certain, 41 Eliz. DUTKED v. TOPPER, in an audita querela against an assignee, shews the seisin, & adhuc seisus existens; but in modern times, viz. in the



2. If the *testator releases his debt*, and makes *executors*, and dies, and they *sue execution* upon statute-staple, there in *audita querela* by the *conusee* he shall not recover damages; for they cannot take *conusance* of the release of the *testator*. Br. Damages, pl. 125. cites 19 E. 3.

3. He who had judgment in the *audita querela* was restored [ 356 ] to the *mesne issues*. Br. Issues Retornes, pl. 18. cites 23 E. 3. and Fitz. Execution 127.

As where  
conusor  
aliened part

of the land, and the *conusee* had *execution against this alliance only*, and he brought *audita querela*, and was restored to the *mesne issues*. Br. Issues Retornes, pl. 18. cites 23 E. 3. and Fitz. Execution 127.

4. A man was bound to J. and H. in a statute staple to the use of J. and after H. released to the *conusor*. Both sued *execution* in Chancery, and the *conusor* brought *audita querela*, and had *scire facias* against them, and the one appeared, and he who released made default, and because the default of one is the default of both, therefore the *conusor* was discharged of execution, and the plaintiff prayed his damage; and per Cur. if it was in C. B. where the process is *venire facias*, he should have damages only in Chancery upon *scire facias*. Per Choke it shall go by order of the *scire facias*, which is to recover no damages. Brooke says, *tamen quere inde*; for by some all is one in this case. *Quere if he shall recover damages against both*, or only against him who released and made default. It seems against both; for the one shall take notice of the act of his companion. Br. Damages, pl. 125. cites 11 E. 4. 8.

Br. Scire  
Facias, pl.  
183. cites  
S. C.

5. Per Vavisor, where two debtors are, and the one is required to pay, and he brings action against both; he only who was required to pay shall render damages. Br. Damages, pl. 125. cites 11 E. 4. 8.

6. In *trespass* by C. against D. the plaintiff had judgment and damages to 14 l. and costs to 5 l. 10 s. and the same was affirmed on a writ of error, and costs to 5 l. 10 s. for delay of execution; but before the judgment affirmed in error, D. released all executions and demands, and yet took C. in execution for damages and costs upon both judgments. C. brought an *audita querela*, and set forth all this matter, and issue was taken upon the release, which was found against D. It was insisted in arrest of judgment, that this release being before the last judgment and not pleaded, the execution is now on that judgment, and so he shall not have the benefit of this release; sed non allocatur; for he had no time to plead it; besides, this 2d judgment is only for the costs increased, and the execution for the first costs and damages is upon the first judgment only, and so barred by this release; and though the execution be entire, yet that is no cause to discharge any more than the first damages and costs on the first judgment, and therefore adjudged that he be discharged as to them, but not as to the 2d costs. Cro. J. 337. pl. 1. Pasch. 12 Jac. B. R. Child v. Durrant.

Roll. Rep.  
11. pl. 12.  
S. C. and  
the Court  
seemed of  
opinion, that  
the release  
extended  
only to the  
damages  
and costs  
given upon  
the first  
judgment,  
and the re-  
porter  
thinks that  
judgment  
was given  
accordingly.  
—Yelv.  
217. Hill.  
9 Jac. Dur-  
rant v.  
Child, S. C.

but S. P. does not appear. — Brownl. 221. S. C. but seems only a translation of Yelverton. — Bullt. 157. Durand v. Child, S. C. but S. P. does not appear.

7. If after judgment and execution awarded an aud. quer. be brought, and by reason thereof the execution is superseded, here if it be found against the plaintiff in the aud. quer. the party shall have execution awarded upon the judgment in the aud. quer. and not upon the first judgment; per Twisden J. Quod nota. Sid. 14. pl. 5. Mich. 12 Car. 2. B. R. Anon.

In audita querela by the course of the Court, the plaintiff enters into

8. If the plaintiff in audita querela gets judgment, he shall be restored to his goods taken in execution before the aud. quer. brought, though there is no such thing mentioned in the judgment. Sid. 74. pl. 4. Pasch. 14 Car. 2. B. R. Brown v. Burnet.

recognisance to discharge himself if the suit go against him, per Twisden; but by Herne secondary, that is only when execution is superseded, or the party taken out of prison; but if the money be on the first judgment paid to the party, there is no remedy for it; but if to the sheriff, the Court upon the aud. quer. may order it to remain there till the suit be determined; and if the plaintiff has judgment

[ 357 ] in audita querela, he shall only be discharged of execution, but shall have no restitution; wherefore (because the plaintiff could not have been taken in execution on the first judgment, but only upon the judgment in the audita querela, the Court ordered the money to be brought into Court, and remain till an end made. Keb. 245. pl. 4. Pasch. 14 Car. 2. B. R. Brown v. Burdet.

By Windham J. by judgment in audita querela brought before the former execution made, he shall be restored to whatever he lost by execution, which the Court agreed, being founded on a release, J. N. B. Adjournatur. Keb. 260. pl. 39. Pasch. 14 Car. 2. B. R. Brown v. Burnet.

9. Note, when one is relieved by audita querela, he shall be restored to whatever he lost by the judgment, 12 Mod. 598. Mich. 13 W. 3. in a nota.

For more of Audita Querela in general, see Conditions, Executions, Imprize, Statute, Superseas, and other proper titles.

## Averment.

(A) What amounts to, or is a sufficient Averment; and what is the Use thereof.

Averment is two-fold, viz. general averment, which is the conclusion of every plea to the writ, or in the bar of repli-

1. THE word Averment is diversly explained in our law; by some it is taken to be, where a man pleads a plea in abatement of the writ, or bar of the action, which he says he is ready to prove, as the Court shall award. Others say it is an offer of the defendant to make good or justify an exception pleaded in abatement or bar of the plaintiff's action; and signifies also the act, as well as the offer, of justifying the exception. Heath's Max. 34.

cations and other pleadings (for counts or avowries in nature of counts need not be averred) containing matter affirmative ought to be averred, & hoc paratus est verificare &c. Particular averments are, as when the lise of tenant for life, or tenant in tail are averred, and there, though this word (Veri-

ficare)



stare) be not used, but the matter vouched and affirmed, it is upon the matter of an averment; and an averment contains as well the matter as the form thereof. Co. Litt. 362. b.

2. *In facto dicit* in a declaration is an averment, but in all subsequent pleas *ulterius dicit* is used. Introduction to Vidian's Entries, Marg. Averment in pleading is in this form in the end of the

plea after this special matter set forth to warrant the same, viz. *et hoc paratus est verificare*. Brown's Anal. 8.

This word *præd.* shall serve for averment; by all the justices. Br. Averment, pl. 65. cites 1 H. 7. 19.

3. A man pleaded *nul tiel record, & hoc paratus est verificare per idem recordum*, this is no plea, nor good averment. Br. Averment, pl. 58. cites 9 H. 7. .2 Heath's Max. 36. S. P.

4. In ejectment of a rectory the plaintiff declared *that the aforesaid A. B. rector of the said church was, and yet is, seised of and in the rectory aforesaid &c. in his demesne as of fee in jure ecclesiæ &c.* After verdict it was moved that the count was insufficient, because the *life of the parson*, who was the lessor, was *not averred expressly, but by implication only*; but the Court, præter Saunders Ch. B. held it sufficient, and judgment accordingly. D. 304. a. pl. 52. Mich. 13 & 14 Eliz. Anon. S. C. cited Arg. Mo. 376. [ 358 ]

5. The proper use of averment consists in this, viz. to add matter to the plea to make doubtful things clear, which otherwise shall be intended against the pleader. Arg. Mo. 376. pl. 506. Mich. 36 & 37 Eliz. in Perrot's Case. The use of an averment is to ascertain that to the Court which is generally or doubtfully alleged, that so the Court may not be perplexed of whom, or of what it ought to be understood. Heath's Max. 42. cites Co. Litt. 352. b.

6. Case, for that Q. Eliz. was seised in fee of the manor of S. and granted to him 30 acres, parcel of the said manor, by copy of court-roll; and that she granted 4 acres, other parcel thereof, to the defendant; and alleged that the *copyholders of the 30 acres, time out of mind, had common in the 4 acres for certain cattle from the 1st Aug. to All-saints, and that the defendant 1st of May, in such a year, inclosed the said 4 acres with hedges and ditches per quod he could not have his common.* After verdict for the plaintiff it was moved, that the plaintiff set forth that the inclosure was made 1st May, but did *not aver that it continued till the 1st of Aug.* and so no cause of action appears. But it was said that if there is any thing which implies an averment, it is sufficient; now here the *per quod he could not have common* is a sufficient averment that the inclosure continued till the 1st of August and after; for otherwise he could not lose his common; besides the jury have found him guilty, which he could not be, unless the inclosure had continued. But Doderidge J. said that the *per quod* is an inference out of the precedent declaration, and does not amount to an averment; but Ley Ch. J. held that it amounted to an averment; but all the Court agreed that after verdict for the plaintiff the judgment was not to be arrested

arrested for the matter aforesaid. 2 Roll. Rep. 379. Mich. 21 Jac. B. R. Colson v. Perry.

7. Error of a judgment in assumpsit, in which the plaintiff declared that *in consideration he would renounce an administration at the request of C. and permit the defendant to administer, that the said defendant would discharge the plaintiff of 2 bonds, and alleged that he did renounce the administration, and suffer the defendant to administer, but that the defendant had not discharged him of the 2 bonds.* It was held by Berkley J. (the other judges being absent) to be error, because he did *not aver that he renounced the administration at the request of C.* For perhaps he might be compelled to renounce by a sentence in the Spiritual Court, or of right the wife (as the defendant was) ought to administer. Adjournatur. Mar. 55. pl. 86. Mich. 15 Car. Clarke v. Spurdun.

8. In false imprisonment in London, the defendant pleaded that *J. S. sued forth a latitat the last day of Trin. term, directed to the sheriff of R. by virtue whereof the sheriff made his warrant to the defendant, who thereupon took the plaintiff, which is the same imprisonment, absque hoc that he is guilty in London, vel aliter vel alio modo.* The plaintiff replied that *the writ was truly prosecuted on such a day after the imprisonment.* Upon demurrer it was adjudged for the plaintiff, because though the teste of the writ is upon record, and the plaintiff cannot aver against it, yet great inconveniences will be if the plaintiff cannot set forth the very time of purchasing the writ, and the relation of the teste is only to prevent fraud, and not justify a tort. Raym. 161. Pasch. 19 Car. 2. B. R. Bilson v. Johnson.

9. In replevin the defendant made cognisance as bailiff to baron and feme, he being *seised in right of the feme for rent in aretro existen.* The plaintiff demurred specially; for that the *life of the wife was not averred.* But Hale Ch. J. held that the in aretro existen. is quasi an averment, and after verdict, or upon a general demurrer, had been good; and Twisden and Wild held it good enough on a special demurrer, which Hale doubted, and judgment was given for the avowant. 2 Lev. 88. Pasch. 25 Car. 2. B. R. Harlow v. Bradnox.

and feme, was a necessary intendment. — Freem. Rep. 107. pl. 128. Holloway's Case, seems to be S. C. but no judgment.

10. In debt on judgment the defendant pleaded in abatement that a writ of error was sued such a day upon the judgment, which writ of error is *still depending* undetermined &c. The plaintiff replies, that *the original in debt was sued before the writ of error was sued, as appears by the teste of the original.* The defendant rejoins that *the original bore teste such a day, which was before the writ of error was sued; but that in fact the original was not sued out until such a day, which was after the writ of error was sued.* The plaintiff demurs, supposing that the defendant was stopped by the teste of the original; and of that opinion was Treby Ch. J. but Powell J. was of the contrary opinion, and said that if a man is arrested, and afterwards

See tit.  
Teste (B)  
pl. 9. and  
the notes  
there.

3 Keb. 151.  
pl. 19. S. C.  
adjournatur.  
But ibid.

[ 359 ]  
166. pl. 46.  
the Court  
conceived  
the avowing  
for so much  
rent arrear  
to the baron  
and feme, was  
a necessary  
intendment.

Id. Raym.  
Rep. 411.  
Mich. 10  
W. 3. in  
Case of Beal  
v. Simpson,  
Treby Ch.  
J. said he  
did not  
know that  
it was ever  
resolved  
that it was  
averable,  
that a writ  
might be  
sued out

wards a writ is sued with a teste antedated in false imprisonment, this may be avoided by pleading. Adjournatur. *Ld. Raym. Rep. 212. Pasch. 9 W. 3. Drinkwell v. Fowkes.*

disputed. But Powell J. held that the time of issuing out the writ is traversable; that in the principal case there is no confessing and avoiding of the writ mentioned in the plea, because the plaintiff shews that there was no such writ, but another writ delivered out after.—A man cannot aver that a writ is of another teste than it bears; but one may aver, quod non emanavit in the time alleged; per Holt Ch. J. *Ld. Raym. Rep. 486. Trin. 11 W. 3. in Case of Mason v. White.*

11. Debt was brought upon a penal law, which by the statute ought to be sued within a year. The defendant pleaded the statute, and that one year was elapsed before the suing the action &c. The plaintiff replied that he sued an original teste such a day, which was within the year. The defendant rejoined that though the writ bore teste within the year, yet it was sued after the year. The plaintiff demurred; and adjudged by the whole Court, that none shall be admitted to aver that an original was sued at any time contrary to the teste; per Treby Ch. J. cited as adjudged. *Ld. Raym. Rep. 212. Pasch. 9 W. 3. in Case of Drinkwell v. Fowkes.*

12. A necessary implication amounts to an express averment. *Arg. Gibb. 123. cites Raym. 34. D. 304. pl. 2. [52.] 2 Le. 50. Palm. 267. Cro. C. 487.*

13. Indictment was that the defendant knowing the will of J. S. to have been proved in the Prerogative Court, cited the executor before himself, being Chancellor of D. to prove the will there, in order to extort money from the said executor. *Ld. Ch. J. Parker* and the Court held, that it being laid that the defendant knew it, that knowledge must have been by a sight of the probate of the will; cited by Mr. Justice Lee. *Gibb. 264, 265. as Pasch. 3 Geo. 1. The King v. Loggen*; but says he does not find that judgment was given in that Case.

An indictment was, that the defendant seized that J. C. was indicted of forgery, and endeavoured to keep out of the way one J. S. who was a

material witness to prove the forgery &c. The Court held the implication as strong as can be; but the question was if an indictment can be taken by implication, et adjournatur. *Gibb. 122. Hill. 2 Geo. 2. B. R. the King v. Lawley.*—*Gibb. 263. Pasch. 4 Geo. 2. S. C.* The Court held this a positive certain averment, and that the same certainty will do in an indictment as will in a count or replication, and judgment for the King per tot. Cur.

## (B) In what Cases Averment may or must be. [ 360 ]

1. HE that will take advantage of any estate, except that of a fee-simple, ought to aver the continuance of such estate, and that is a certain rule in pleading. *Arg. Bridgm. 97. cites 15 E. 3.*

2. In trespass of trampling his grafs, the defendant said that J. who had common there, licensed him to put in his beasts; and the plaintiff said that it was his several close, and was not suffered to have such general averment against the special matter, but ought

to traverse the licence, or the title of common. Br. Averment, pl. 66. cites 3 H. 4. 6. 8. in the written book.

3. In debt of 10l. upon an obligation of 100l. and confessed payment of all but of 10l. and the defendant pleaded acquittance of 10l. in part of payment of 100l. and the plaintiff averred that the acquittance was of another 10l. prius &c. Br. Averment, pl. 11. cites 7 H. 6. 34.

But in debt upon the same obligation the defendant

4. In detinue of a single obligation, the defendant prayed garnishment. The garnishee may aver that it was delivered upon certain conditions &c. Br. Averment, pl. 62. cites 8 H. 6. 28.

can not aver any condition, when none is written upon the obligation. Ibid.

5. The defendant cast superseades of privilege of Chancery, because he was servant of the Chancellor of England the day of the writ purchased, and yet is, and demanded judgment if the Court will take consuance; and the plaintiff said that he was not servant of the Chancellor the day of the writ purchased, nor ever after; by which, because the defendant refused the averment, and stood upon the writ of superseades that it ought to be allowed, by reason of the words of the King, viz. ut accepimus, and therefore, for the not defending, it was awarded that the defendant answer; quod nota. Br. Averment, pl. 15. cites 21 H. 6. 20.

6. It appears in the books of entries, that where a plea is either pleaded to the jurisdiction, or to the person, by matter en fait, as profession or villeinage, there be always averments, which seem to be of necessity by 37 H. 6. 14. because to these, answers may be made; quod nota. Heath's Max. 36.

7. In præcipe quod reddat, the tenant vouched one within age, and prayed that the parol demur; and the demandant tendered averment that he was of full age, and the tenant that he was within age, and not of full age, and the averment received. Br. Averment, pl. 16. cites 33 H. 6. 48.

8. In quare impedit, if the ordinary returns nonability, perjury, or criminosus, by which he refused him, he shall not tender the averment. Br. Averment, pl. 26. cites 39 H. 6. 48.

9. So where the sheriff returns petit issues per Billing. he ought to aver the matter here; for the presentment is the original of the King in this case, and he has no other original, and the return is the answer of the abbot, and shall plead for the matter upon it, therefore he ought to aver the matter; but Yelverton said, No, for they shall not plead till the attachment; contra Choke. Ibid.

And. 114. S. C. and the best opinion was, the plaintiff [ 361 ] shall have averment; for otherwise he shall be barred by

10. Debt against J. S. of D. yeoman, the defendant appeared by attorney and waged his law, and at the day came J. S. of D. yeoman to make the law, and the plaintiff said that in the same vill there are two J. S.'s of D. yeomen, the elder and the younger, and he sued the eldest, and he who appears to make the law is the youngest, and by some he shall have this averment, and process against the eldest; for now it shall be intended that the attorney appeared for the youngest, who now comes to make his law; and

and some e contra, and that it shall be intended that the attorney appeared for the eldest; for it shall be intended as here that the suit is against the eldest, because there is no addition; for the eldest shall not change his name for the youngest, but the youngest for the eldest, & adjournatur, therefore quære. Br. Averment, pl. 32. cites L. 5 E. 4. 23.

the ley gager of a stranger, which is no default.

11. If a plea wants an averment, or have not a sufficient averment, the same is not good; quod nota. Heath's Max. 36. cites 12 H. 7. 2.

12. *Debt upon an obligation of 20l. the defendant pleaded acquittance of the 20l. the plaintiff said that this 20l. in the acquittance was for rent fold, and the obligation is of 20l. for 4 acres of land in D. fold, and a good plea per tot. Cur. and so matter of fact averred to the acquittal; and the other said that the obligation for the same 20l. now in demand was for the land, and not for the cause in the acquittance, prst, and the other e contra, and a good issue if the obligation be of the matter of which the acquittance makes mention or not.* Br. Averment, pl. 29. cites 3 H. 7. 15.

13. He who pleads a plea in the affirmative ought to aver it, et hoc paratus est verificare &c. but he who pleads in the negative, e contra &c. Br. Averment, pl. 20. cites 14 H. 8. 27. and 27 H. 6. and 9 H. 7. per Brooke J.

14. Demandant of dower before execution awarded, may aver that her husband was seised, and so to have damages. Godb. 212. pl. 302. Mich. 11 Jac. C. B. and says, therewith agrees Porter's Case, 14 H. 8. 25. 22 H. 6. 44. b.

15. A release or justification, or any matter in the affirmative pleaded without an averment of the plea, the same is ill. Heath's Max. 36.

16. There needs no general averment in plea, or particular averment in a declaration of that which will come in more properly on the other side. Heath's Max. 37. cites Hob. 78. 124.

17. There will need no averment in a declaration where it appears there are reciprocal remedies. Heath's Max. 37. cites Hob. 88. 106.

18. Excommunication and outlawry may be pleaded without averment, because those pleas require no replications to them. Heath's Max. 36. Brown's Anal. 8.

19. Averment ought to be upon all pleas in bar, and to the writ, in replication but not rejoinders, though it hurts not when it is needless but upon the general issue, or a plea in the negative, or a plea apparent in the writ, or upon the challenge to the array, no averment. Brown's Anal. 8.

Heath's Max. 35.

20. No averment will lie against a violent presumption though it be false. Heath's Max. 39.

As if tenant disclaims upon an averry in

replevin he shall have judgment, though it be false. Heath's Max. 39. cites Hob. 297. & Co. Litt. 373.

21. Note, per Cur. because the entry of challenges to the array &c. are not that a man ought to tender averment, therefore if  
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the tenant challenges the array, and does not say, *et hoc paratus est verificare* &c. yet the challenge is good; and so it was adjudged by good advice, after it had depended two terms. Br. Averments, pl. 1. cites 27 H. 8. 14.

22. In an action upon the statute 32 H. 8. against buying pretended titles, if the plaintiff declares, that the defendant, nor any of his ancestors, nor any other person under whom he claims were in possession of the land, nor received the rents &c. by the space of a year &c. he need not aver, that it was a pretended right, because the statute makes it so; and then to aver that which appears both by the statute and the declaration is needless. Pl. C. 87. b. by Cooke J. Hill. 6 & 7 E. 6. in Case of Partridge and Strange.

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It is a rule in pleading, that nothing needs be averred that appears sufficiently without it.

23. Where a thing is apparent of itself there needs no averment; as where it is prohibited that none alien in mortmain, if the lord shews that he entered into the lands within the year, because his tenant aliened in fee to the dean and chapter, he shall not aver that this is mortmain, because it appears upon the matter to be so. Pl. C. 81. a. b. Arg. Hill. 6 & 7 E. 6.

Arg. 10 Mod. 392. —Averment needs not be of what is apparent, as the constitution made in London, concerning the sale of wares and merchandises appearing to be agreeable to and warranted by their charter, the same needs not be averred to be so. Heath's Max. 37, 38. cites 2 Rep. City of London's Case, and 9 Rep. 54.

And if the son brings an assise of mortdancer, he needs not to aver that it is within the time of limitation, for that it appears to be so. Heath's Max. 38.

*Quod constat clare non debet verificari.* 10 Mod. 150. —S. P. by Holt Ch. J. in delivering the opinion of the Court. Ld. Raym. Rep. 13. Trin. 6 W. & M. in Case of the King and Queen v. Knollys.

The defendant need not to aver his avowry with an *hoc paratus est verificare*, because the defendant in his avowry is actor, for he shews his matter which is a count, and is to have a return, and therefore as plaintiff he shall not aver his avowry no more than the plaintiff shall aver his count. Pl. C. 342. Hill. 7 Eliz. Bret v. Rigden. —S. P. Pl. C. 163. Pasch. 3 Mar. agreed, after search and report by the prothonotaries, in Case of Throgmorton v. Tracy.

24. Counts, and all such as are in nature of counts (as avowry), need not be averred, but all other pleas in the affirmative must. Co. Litt. 303. a.

*hoc paratus est verificare*, because the defendant in his avowry is actor, for he shews his matter which is a count, and is to have a return, and therefore as plaintiff he shall not aver his avowry no more than the plaintiff shall aver his count. Pl. C. 342. Hill. 7 Eliz. Bret v. Rigden. —S. P. Pl. C. 163. Pasch. 3 Mar. agreed, after search and report by the prothonotaries, in Case of Throgmorton v. Tracy.

25. A man shall never be estopped from making such an averment to ascertain the intent of the parties, if it be not utterly inconsistent with that which is alleged; for an estoppel being to conclude a man from speaking that which is truth, must be certain to every intent, and shall never be taken by argument or inference. Heath's Max. 42, 43. cites Co. Litt. 352. b.

26. Averment is not necessary in avowry, *et hoc paratus est verificare*; for it is in lieu of declaration, and the avowant is actor. Br. Averment, pl. 81. cites 3 M. 1.

27. C. sold lands sowed with woad, and promised, that if the vendee should be prohibited by proclamation or otherwise, to sow and make woad, then he would return so much of the purchase money. The vendee brought an action on the case against the vendor, and set forth, that a proclamation was made, that no man should sow woad within 4 miles of any market or clothing town &c. and that his land was within 4 miles of a market town, but because he did not

aver that it was a clothing town also, the defendant demurred: and all the judges held it a sufficient cause of demurrer. Goldsb. 71. pl. 15. Mich. 29 & 30 Eliz. Cogan v. Cogan.

28. If land be conveyed to A. in tail, with power to him, in default of heir of his body, to limit the fee tail to whom he pleases, and in default of such issue and nomination and limitation to B. in fee; in this case, upon a petition of right or formedon brought, if A. dies without issue, it is sufficient for B. or his heir to mention that A. died without issue, without making mention of the said power; but if he mentions the power, he ought to aver the death of A. without issue, and that A. made no nomination of, or limitation to, any one. Jenk. 213. pl. 50.

29. Testator promised to pay 20l. at his death. In case against the executor the plaintiff had a verdict. It was moved in arrest of judgment, that the plaintiff had not averred that the money was not paid by the testator in his life-time; but the Court held it well enough, because the money was not payable whilst he was living. Hard. 221. Hill. 13 & 14 Car. 2. in Scaccario, Greenway v. Horneblow.

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30. Where a justification in trespass is at the same time and place, it is not necessary to aver it to be the same trespass; per Cur. Carth. 280. Trin. 5 W. & M. in B. R. King v. Phippard.

31. In trespass, the defendant pleaded, that a levavi facias issued out of the Exchequer &c. Exception was taken, that it was not said that the writ was delivered to the sheriff, or the warrant to the bailiff; sed non allocatur; for per Cur. though it is the practice to say so, yet it being a plea in bar, it shall be good to a common intent; and if the cattle were taken before the delivery of the writ, the plaintiff should have shewn it in his replication; for no special matter shall be supposed to intervene to make a man a trespassor unless it be shewn. Ld. Raym. Rep. 310. Hill. 9 W. 3. in Case of Britton v. Colq.

32. If goods be sold for so much as they are worth, the value may be ascertained by averment; per Powel J. Cumb. 426. Trin. 9 W. 3. B. R. in Case of Hayward v. Davenport.

33. 4 & 5 Ann. cap. 16. No exception or advantage upon a demurrer shall be taken for want of averment of hoc paratus est verificare, or hoc paratus est verificare per recordum, or of not alleging prout patet per recordum, except the same shall be specially set down for cause of demurrer.

### (C) Of what it may be.

1. LORD and tenant; the tenant is outlawed of felony, and after reverses it by error by reason of imprisonment at the time &c. The lord to have the escheat cannot aver that he was at large at the time &c. for, as it seems, then the life of the tenant shall be in jeopardy again. Br. Averment, pl. 39. cites 16 E. 3. and Fitzh. Outlawry 48.

And if the bishop certifies that the party was in his prison at the time &c. the lord shall not

have averment that he was at large &c. Quod nota. Ibid.

C c 2

2. If

2. If a man *appears as vouchee*, the tenant may aver that he is *not the same person* who was vouched. Br. Averment, pl. 37. cites 20 E. 3. and Fitzh. Voucher 128.

\* And so are the other editions of Br. but it seems it should be 40 E. 3. 36.

—Br. Coun-

terplea de Voucher, pl. 8. S. P. and cites 40 E. 3. 36. —In *præcipe quod reddat* the *tenant vouches*, and *summons to the pluries*, & *sequatur* issued against the *vouchee*, and no writ served, the *tenant would have averred* that after the issuing of the writ of *sequatur*, the *vouchee died*; and the best opinion was that he shall have the averment. Br. Averment, pl. 22. cites 14 H. 6. 7. 19.

4. The *intent* of a man lies in averment, if he *chases his beasts out of that land into other land*, to the intent that the lord shall not distrain them. Br. Averment, pl. 50. cites 44 E. 3. 20.

5. A man made return, and said that he is *under-sheriff*, and the party averred to the contrary, and had the averment; but *contra* against the *high-sheriff*, and this upon examination by the justices. Br. Averment, pl. 52. cites 8 H. 4. 20.

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6. In *præcipe quod reddat*, if the *sheriff returns quod mandavi ballivo libertatis de E.* qui return. quod summ. &c. the tenant shall not take the averment, that the land is *infra libertates de S.* and not *infra libertates de E.* nor he shall not take thereof issue with the sheriff nor with the demandant, for the tenant is at no mischief; quod nota by award. Br. Averment, pl. 46. cites 34 H. 6. 3.

7. Where a man casts writ of privilege as servant of the Chancellor, Baron of the Exchequer, or the like, the plaintiff may aver that the defendant is not servant to him prout &c. nor was not at the day of the writ &c. Br. Averment, pl. 63. cites 34 H. 6. 15. and 21 H. 6. 22. and often elsewhere &c.

8. A man may aver by special plea that another of the same name was outlawed or excommunicated, or appeared to the action in a recovery, and not this now party, or may say that the plaintiff was excommunicated before the last continuance, and absolved, and was not excommunicated after the last continuance. Br. Averment, pl. 24. cites 36 H. 6. 17. per Prisot and Wangf.

9. Accessary who is outlawed of felony may aver that the principal was dead before the outlawry, and if it be found for him he shall be restored. Br. Averment, pl. 61. cites 21 H. 7. 31.

As where a suit is in the Court of Admiralty for a thing done upon the land; the defendant may aver that it was done *infra corpus comitatus*. Ibid.

10. Libel was brought in the Court of Arches; it was held that an averment being out of the proper diocese, for a legacy may be that the suit is out of the proper diocese, if the same doth not appear in the libel. Godb. 214. pl. 306. Mich. 11 Jac. C. B. Hughe's Case.



(D) Averments as to Deeds.

1. **ONE** cannot avoid a *statute merchant, obligation, release, &c.* against the party himself named in it, by averring a delivery thereof upon condition, unless he shews a writing of the condition. Br. Faits, pl. 10. cites 43 E. 3. 27.

2. But it is otherwise in *detinue* against a stranger, where the thing is bailed into an indifferent hand; nota the diversity; for there it is averrable, contrary against the party himself. Br. Faits, pl. 10. cites 43 E. 3. 27.

3. A. has 2 sons named W. and levies a *fine to W.* Averment that this was to *W. the youngest*, is good; but gift of goods to one of the sons of J. S. no averment can be. 8 Rep. 155. a. per Cur. Mich. 8 Jac. in Altham's Case, cites 47 E. 3. 16. b. Br. Nofme, pl. 63. cit. 47 E. 3. 17. S. C. & S. P. — Br. Fine, pl. 28. cites S. C. & S. P. — Fitsh. Feoffments &c. pl. 56. cites Hill. 47 E. 3. 16. S. C. & S. P. — 5 Rep. 68. b. S. C. cited per Cur.

4. A man shall avoid *specialty* in several cases by a naked averment, per Keble and others. Br. Barre, pl. 68. cites 1 H. 7. 14. As where a man is obliged in 100l. to a feme sole, and after she marries him, or where a man is obliged to a villein regardant, and after purchases the manor to which the villein is regardant, or if 3 are obliged to me, and I break one of their seals, or if the obligee enters into religion, and after brings action of debt; per Keble and others, which the justices agreed. Br. Barre, pl. 68. cites 1 H. 7. 14.

5. Against a *consideration* alleged in a deed, or an *use declared*, no averment to the contrary can be received; so of *indentures upon fines* and recoveries, where the fines and recoveries pursue them, cites 1 El. Dy. 169. Altham's Case. 8 Co. 148. Countess of Rutland's Case. 5 Co. 25. 26. Nihil est tamen naturale quam quidlibet dissolvi eo modo quo ligatur. Contract by contract, deed by deed, record by record, parliament by parliament. Jenk. 166. pl. 20.

6. An *assurance* was made to a woman to the intent it should be for her *jointure*, but it was not so expressed in the deed; per Cur. it may be averred that it was for a jointure, and such averment is not traversable. Owen. 33. Trin. 7 Eliz. Anon.

7. No averment de hors can make that good which is apparent on *consideration of the deed*, to be void, as *feoffment to A. and his heirs*. No averment can be that it was the intention of the parties, that the feoffee should not have estate but to him, and the heirs of his body. 8 Rep. 155. Mich. 5 Jac. in Altham's Case.

8. *Buying of debts* is maintenance at common law, and punishable by indictment or information; but it is not pleadable in bar of this obligation; for the condition of the obligation was to pay a sum of money not for debts bought, and this *buying* is collateral to the condition. So a bond for payment of a sum of money upon condition, in the case of *simony*, the simony may be pleaded against such bond by virtue of the 31 Eliz. cap. 1. So for *usury*, 13 Eliz. cap. 8. So against a bond given to the *sheriff or gaoler*, contrary to the statute of 23 H. 6. cap. 10. These

And ibid. said it was so held in Case of Queen v. Dame Beaumont.

Wherethere is usury, or fraud, or covin, they may be averred to be so against any act whatsoever. Jenk. 254.

in pl. 49.— statutes give averment in such cases, but there is no statute  
*The obligor in an absolute bond made to a* which gives such averment in the case of maintenance. Jenk, 108. pl. 9.

*sheriff for payment of money*, instead of being for a security against escapes, and mentioning nothing thereof, and also an obligor in the case of *simony and usury*, is admitted to aver against the condition of a bond, or against the bond itself for *necessity's sake*. *Nota.* Carth. 300, 301. Pasch. 6. W. & M. in B. R. Foden v. Haines.

9. When a deed is perfected and delivered as his deed, no verbal agreement afterwards may be pleaded in destruction of the deed; but when the agreement is parcel of the original contract, it may be pleaded; but if it had been expressed within the deed that the bargain should have the profits, and it was delivered accordingly, no agreement or assignment of the profits can now avoid it, or make the contract not be *usurious*, which was so otherwise, and judgment accordingly. Brownl. 191, Burglacy v. Ellington.

10. It was agreed that if a case be within the statute of gaming, the defendant may aver against his own deed. Cumb. 328, Trin. 7 W. 3. B. R. St. Leger v. Pope.

11. Two manors were known by the name of W. and sometimes distinguished with an alias. An annuity of 200l. per ann. is granted out of the manor of W. One of them is but 80l. per ann. and the other of more than the annuity. It is a good averment in law that the greater manor should be liable to the rent-charge, Chan. Rep. 138, 15 Car. Harding v. the Earl of Suffolk.

Br. Nofme,  
 in pl. 63.  
 S. P. cites  
 Mich. 12  
 H. 7. 6.—  
 Br. Fines,  
 in pl. 28. cites S. C. and S. P.

12. If one has 2 manors known by the name of W. and levies a fine of his manor of W. he shall by averment ascertain which of them it was; per Cur. 6 Mod. 235. Mich. 3 Ann. B. R. in Case of Davenant v. Rafter,

13. 4 & 5 Ann. 16. In debt on single bill, debt, or scire facias upon a judgment, the defendant may plead payment in bar. In debt upon bond, if the defendant before action brought hath paid the principal and interest, due by the defeasance or condition, he may plead payment in bar.

[ 366 ] 14. Bill to have the benefit of a marriage settlement, and covenants therein contained &c. The case was, *Rooke upon his first marriage settled lands upon himself for life, remainder to his wife for life for her jointure, remainder to the first and other sons in tail male, remainder to the heirs female of the body of the husband and wife, and the heirs of the bodies of such heirs female, remainder to the right heirs of the husband, with a covenant that he was seised in fee, and had good right to make such settlement, and that the persons should enjoy according to the limitation in the settlement &c.* The wife dies without a son, leaving only one daughter, who is the plaintiff. *Rooke after the death of his wife, being seised of a remainder in tail, viz. to the heirs female of his body, levies a fine, and suffers a recovery, to bar the issue female &c.* Harcourt C. said that here are no articles precedent to the settlement

ment, and he cannot admit parol evidence of instructions to controul the deeds, for that would introduce strange uncertainty in deeds; that there is no relief in equity in this case upon the general covenant, to enjoy according to the limitation in the settlement, though tenant in tail doth levy a fine, and suffer a recovery to bar the issue female and the remainder. Bill dismissed with costs. Per Harcourt C. MS. Rep. Trin. 12 Ann. Asherton v. Rooke.

(E) Averment against Records &c.

1. **A. BROUGHT** a *formedon against husband and wife*; the wife was received for the default of her husband, and vouched her husband by a strange name, and upon shewing of the demandant that the vouchee was the husband of the woman (the tenant) cause was shewn (as it ought to be) and it was shewn, that the husband levied a fine to one T. sur consuance de droit come ceo, and that T. by the same fine rendered the said land to the husband and wife, and the heirs of the husband, and that the husband had before infeoffed T. of the said land, with warranty to him, his heirs and assigns, and that she is the assignee of T. The averment of the demandant in this case against this fine, that the husband never had any thing in the land, was received by judgment in parliament; for the demandant is a stranger to the fine, and where the cause of voucher is shewn the cause is traversable. Jenk. 12. pl. 20.

In Marg.  
cites 13  
E. 3.

2. A man had averment against an execution upon a statute merchant, that the party is at large, for it may be that he escaped after. Br. Averment, pl. 38. cites 18 E. 3. and Fitzh. Utlawry 47.

3. In trespass, if the defendant pleads that the plaintiff at another time recovered for the same trespass, which record is certified to be at another day than that which the plaintiff counts of, the defendant may aver that all is one and the same trespass. Br. Averment, pl. 41. cites 38 E. 3. 17.

4. Averment may be had that the testator died intestate, and that the administration was committed to him, though the other shews testament proved before the ordinary; for record there is not of record in Curia Regis. Br. Averment, pl. 48. cites 44 E. 3. 16.

5. In *scire facias* against a parson, upon recovery of an annuity against his predecessor to have execution of the arrears, the defendant shall not have averment that *riens arrear without acquittance*, nor that the plaintiff had execution, without shewing thereof record or specialty, because the action is founded upon record. Br. Averment, pl. 49. cites 44 E. 3. 18.

6. In *audita querela* upon indenture of defeasance, a man may aver the payment to be made, though the statute be matter of record; for the indenture is matter in fact; but contra of such averment without indenture. Br. Averment, pl. 51. cites 46 E. 3. 33.

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7. Where it appears of record, that the feme defendant in writ of maintenance appeared in proper person at nisi prius, and after it was found by verdict in writ of error that she died 4 days before the day of nisi prius; and by all the justices, the taking of this second verdict of the death of the feme in jeofail, and nothing to the purpose, because it appears by the first record that the feme was alive at this time, and matter in fact expressly contrary to the record cannot be taken; for matter of record does not lie in averment to be tried per pais, but shall be tried by the record itself; for verdict cannot defeat a record. Br. Repleader, pl. 61. cites 11 H. 4. 52.

8. A. upon 1st of May, the 2 Car. 1. makes a feoffment of his land to B. and committed felony on the 3d of May, 2 Car. 1. and the indictment of this felony committed by him is the 1 May, 2 Car. 1. A. is arraigned upon it, and confesses the indictment, and is hanged; this does not destroy the estate of B. It would be otherwise if he were convicted by verdict, because of the negligence of B. that he did not inform the judges and the jury of the truth of the matter. Jenk. 128. in pl. 59. and cites Fitzh. Averment, 46.

9. If a man is bound by recognizance with condition to cause J. N. to appear in the Court of Chancery such a day, he cannot aver that he appeared that day, unless his appearance be not of record; per Babb, Cott. June and Fray; the reason seems to be, that the recognizance is matter of record, but quære the reason of the condition. Br. Averment, pl. 10. cites 7 H. 6. 26.

10. Where protection is cast, the plaintiff cannot take averment that he is not dwelling prout &c. or is not about to go prout &c. but shall be put to sue a repellance &c. but by the statute of Westm. 1. cap. 43. averment may be taken against an *essoign de ultra mare*, but no averment shall be taken against an *essoign de servic. Regis nor protection*; quod nota. Br. Averment, pl. 14. cites 21 H. 6. 20.

11. If protection is cast, the plaintiff shall not have the averment immediately that the defendant is *infra quatuor maria* at D. in the county of C. out of the service of the King, but this shall be entered immediately, and he shall aver it upon the re-summmons, which matter found shall turn the defendant in a default by the statute, if it be in *præcipe quod reddat*; quære. Br. Averment, pl. 25. cites 28 H. 6. 3.

12. Where a recovery is removed out of a court baron, the party may aver that the record is otherwise by the statute of 1 E. 1. quod nota, alteration of record in a base Court. Br. Averment, pl. 3. cites 34 H. 6. 53.

13. An averment may be had against any part of the rolls or records of County Courts, Hundred Courts, Courts Baron, or other Courts belonging to lords of manors. Heath's Max. 39. cites 34 H. 6. 42. and 9 Ed. 4. 4.

14. At the nisi prius, protection quia moratur. was shewn. Ascough said, averment may be taken contrary to the protection; but Paston and Fulth. e contra, and that he shall sue repeal, and yet by the statute Westm. 2. cap. 42. averment is given against  
an

an effoign quia ultra mare, but averment does not lie against an effoign de servic. Regis. Br. Averment, pl. 31. cites L. 5 E. 4. 3.

15. A man makes a lease for years the 10th of May, and then the lessor bargains and sells this to another by deed inrolled, bearing date the 10th of April, and it was entered to be conveyed the 10th of April before, but in truth it was delivered, and acknowledged, and inrolled afterwards; and it was held that the bargainee [lessee] was without remedy at the common law, for he cannot plead that it was acknowledged or delivered after the date of the day of acknowledging, and so was the opinion of Rhodes; Periam, Windham, and Anderson being absent; for he cannot aver that it was inrolled or acknowledged at another day than it is recorded, because it is contrary to the record, for it is entered that it was acknowledged the 10th of April, and then if such a plea should be admitted, it would shake most of the assurances in England. Ow. 138. Hill. 30 Eliz. Sir Thomas Howard's Case.

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16. Upon the statute of 13 Eliz. against usury, and 27 Eliz. against frauds, although fines be levied; yet where there is usury or fraud, or covin, they may be averred so to be against any act whatsoever. Jenk. 254. in pl. 45.

17. Where D. has appeared as an attorney for A. in an action brought by A. against B. it cannot be assigned for error that D. was not an attorney, or that there is no such person in rerum natura; for it is against the record; and the admittance of him for an attorney by the Court, makes him an attorney, if he was not an attorney before this admittance. In a writ of error brought in this suit, and error assigned ut supra, the defendant in the writ of error in this case pleads in nullo est erratum; this does not confess that he was not an attorney, but this plea est quasi a demurrer, that this is not error at all. Judged and affirmed in error. Jenk. 332. pl. 66.

16. In scire facias against C. to repeal a special livery granted to him upon his coming of age. Upon demurrer the question was, whether the Attorney General could aver against an inquisition returned into the Petit Bag, though not taken before the escheator, but put in by another; and it was resolved that he could not; for this cannot be tried by a jury, but upon an examination in Court, and there to be redressed. Jo. 389. pl. 9. Pasch. 12 Car. B. R. The King v. Cage.

17. Where a statute is recited, there one may not aver that there is no such record; for generally an averment, as this is, doth not lie against a record; for a record is a thing of solemn and high nature, but an averment is but the allegation of the party (21 Car. B. R.), and not so much credit in law to be given unto. L. P. R. 155.

18. If a justice of peace records a force on view, you shall not aver against it. 12 Mod. 44. Trin. 5 W. & M. Anon.

19. Matter of record shall not be avoided by a collateral averment; held per Cur. Skin. 407. pl. 2. Hill. 5 W. & M. in B. R. Prigge v. Adams,

20. Whe-

20. Whether the *bail* shall be admitted to aver against the record in the original action, viz. that defendant was in custody Mar. in Hil. Term, anno 7 W. 3. as the declaration set forth; now if he was not in custody in that term, as defendants in their plea have averred, then this *bail* cannot be taken to be in the same action. The Court inclined against the plea; but the *scire facias* was quashed for other matter, and so the point in law was not determined. Carth. 403. Pasch. 9 W. 3. B. R. Whaley v. Reynolds.

21. Averment lies not against the proceedings of a court of record. 2 Hawk. pl. c. cap. 1. f. 14.

22. Master in Chancery certified that writings were not delivered in, but the clerk [in Court] offered to prove that they were delivered in; but the Court would not suffer an averment against the master's certificate. Sel. Ch. Cases in Ld. Keeper's time, 5, Mich. 11 Geo. Liman v. ....

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## (F) Of the Life of a Person.

As where  
tenant in  
tail of a rent  
grants the  
rent over, the

1. HE that claims estate from tenant for life, or in tail, or from parson of a church, ought to aver his life. Br. Estate, pl. 18. cites 19 H. 6. 73, 74. and 22 H. 6. 17.

grantee in making the title ought to aver the life of the tenant in tail, because by his death the grant is determined. Arg. Bridgm. 97. cites 15 E. 3. and D. 73. 19 H. 6. 73. 5 H. 7. 39. and 15 E. 4. 6. — Lat. 257. Arg. cites 9 E. 4. 16. S. P.

Where tenant in tail is of rent, which had no effect before the grant made in tail, and he grants it over, the grantee who avows or justifies ought to aver the life of tenant in tail; so by several, where he suffers a recovery of the rent. Quære; for by some there is fee simple for the time. Br. Tail & Dones &c. pl. 15, cites 15 E. 4. 6. 3.

Le. 280. pl.  
379. Pasch.  
28 Eliz.  
C. B. the  
S. C. in  
totidem ver-  
bis. — 7  
Rep. 28. a.  
Baskervill's  
Case, S. C.  
but S. P.  
does not ap-  
pear.

2. In a quare impedit the plaintiff declared that W. was seised of the advowson in gross, and granted it to the plaintiff and others to the use of the grantor for life, and afterwards to the use of R. his son in tail; proviso that if the grantor died, R. being within the age of 23 years, that then the grantees and their heirs should be seised to themselves and their heirs, until R. should arrive to that age. The grantor died, R. being then 14 years old, and no more, so that the grantees were possessed of the said advowson &c. and afterwards the church became void, and so it belonged to them to present. Exception was taken against this declaration, because the plaintiff had not averred the life of R. upon whose life his interest did depend; but it was answered per Puckering serj. that the declaration is good enough; for though the life of R. is not expressly averred, yet an averment is strongly implied; for the plaintiff sets forth that the father died, his son being of the age of 14 years and no more, by force whereof he was possessed of the advowson, and being so possessed the church became void; now he could not have been so possessed, if R. had not been then alive, and that is as strong as an averment. And the Court disallowed the exception; for seisin shall be intended to continue till

till the contrary appears. 2 Le. 50, pl. 61. Mich. 29 Eliz. C. B. Baskerville v. the Bishop of Hereford.

3. In dower or appeal the life of the husband, or of the party killed, may be averred in any place; per tot. Cur. Bull. 43. Mich. 8 Jac. in Case of Luther v. Saunders.

4. Lessee for years of tenant for life declares in ejectione forme, that he being possessed of this lease for years made to him by tenant for life, was thence ejected. This word (*possessed*) is a sufficient averment of the life of the lessor. Adjudged for the plaintiff, and affirmed in error, and cites Dyer 304. It is all one in such case, if the count be of an ejectionment termino suo nondum inde finito. Jenk. 327. pl. 48. Mich. 10 Jac. Thompson v. Withers.

2 Bull. 263. Mich. 12 Jac. Thompson v. Withers, S. C. adjudged in C. B. and affirmed in B. R.

5. In ejectionment the plaintiff declared that M. being tenant for life, made a lease to him for three years, if he should so long live, *virtute cuius* he entered and was possessed, until the defendant ejected him termino suo nondum finito. After verdict for the plaintiff it was moved that the declaration was ill, because the plaintiff did not aver the life of M. at the time of the action brought. But 3 justices contra Chamberlaine, held it well enough; for shewing that the defendant ejected him a termino nondum finito, implies that M. is yet alive; for otherwise the term is determined, and judgment for the plaintiff, and affirmed in error in Cam. Scacc. Cro. J. 622. pl. 13. Mich. 19 Jac. Arundel v. Mead.

Palm. 267. S. C. in B. R. adjudged accordingly. —Ibid. 327. Mead v. Arundel, S. C. and judgment affirmed by all the justices of C. B. and barons in the

Exchequer Chamber. —Jenk. 319. pl. 19. S. P. accordingly, cites 14 Jac.

## (G) General. Where the Matter is Special. [ 370 ]

1. IN *cofnage* the tenant pleaded that R. his father was born within espousals between the demandant's grandfather and M. and was elder than the father of the demandant, by whom the demandant conveyed. The demandant replied that his grandfather had no such son as R. father of the tenant, but was son of one T. P. and was not received to this general averment contra the special matter, by which the issue was taken that the grandfather had issue the father of the demandant, absque hoc that he had such issue as the father of the tenant, born and begotten within the espousals, prist. The tenant rejoined that the grandfather espoused M. during which espousals they had issue R. father of the tenant, and so is R. son of the grandfather, prist; and the others e contra. Br. Averment, pl. 71. cites 21 E. 3. 39. and 39 Aff. 10.

2. In false imprisonment the defendant justified for arrest of the plaintiff by the command of his master, as his *vellein* regardant to his manot of D. The plaintiff replied that he was born before espousals, which is special bastardy; and the defendant rejoined that he is *vellein*, prist. But Knivet and Thorp held that he shall not have such general averment against matter special, by which he said that he was born before espousals, prist. Br. Averment, pl. 70: cites 38 E. 3. 34.

3. See

3. See averment of *general bastardy* against *special espousals* alleged. Br. Averment, pl. 47. cites Pasch. 40. E. 3. 16.

4. In *trespass of a boat* taken and carried away, the defendant *pleaded that the plaintiff by this deed &c. gave to the plaintiff all his goods, at which time the boat was the plaintiff's, whereupon he took it, judgment &c.* The plaintiff *replied that he carried away his boat, prist.* Et non allocatur contra this special matter, because the deed binds him. Br. Averment, pl. 75. cites 42 E. 3. 2.

5. Whereupon he *said that it was his boat at the time of the taking, & non allocatur, without saying how he came to it after.* Quod nota per judicium. Br. Averment, pl. 75. cites 42 E. 3. 2.

6. Whereupon he *said that he took the boat, absque hoc that the boat was the plaintiff's at the time of the gift, & non allocatur.* Br. Averment, pl. 75. cites 42 E. 3. 2.

7. Whereupon he *said that at the time of the gift the boat was one Alice J.'s, and so he carried away the boat of the plaintiff; & non allocatur, without shewing how it came from Alice, per judicium.* Br. Averment, pl. 75. cites 42 E. 3. 2.

8. Whereupon he *said that Alice sold the boat to him after the gift, and so he carried it away, and the defendant said that it was the boat of the plaintiff at the time of the gift, prist &c.* Br. Averment, pl. 75. cites 42 E. 3. 2.

9. In *trespass* the defendant *pleaded that the plaintiff was his villain.* The plaintiff *replied that his grandfather was frank and adventitious, and his father also, judgment &c.* The defendant said that *his villain, prist; and no plea contra the especial matter; by which he said that his villain, prist, and not adventitious.* Br. Averment, pl. 74. cites 43 E. 3. 4.

10. In *trespass* the defendant *prescribed for common* in the place where &c. the plaintiff *replied that he had depastured in his several, prist &c. and no plea contra this special matter; whereupon he said that it was his several absque hoc, that he had common there, and the other e contra.* Br. Averment, pl. 70. cites 49 E. 3. 19.

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11. In *trespass* the defendant *said that the place where was his several soile, by which he took them damage feasant; the plaintiff replied that the defendant and J. N. were tenants in common, pro indiviso and leased his part to the plaintiff for 10 years, by which he entered, and the defendant rejoined that it was his several soile, prist, & non allocatur, without answering to the special matter, by which he said that the plaintiff had nothing of the lease of the said J. N. and the first general averment refused, 3 H. 4. in the written book.* Br. Averment, pl. 5. cites 3 H. 4. 8.

12. *Escheat* after the death of A. his tenant without heir; the tenant *said that A. had issue J. by E. his feme at D. que estate he has, the demandant replied that he died without heir, prist; Thirn. said, that they should not have such general averment against this special matter, but shall say J. is not heir to A. or that A. had no such daughter as J. because the birth of J. is alleged, quære.* Br. Averment, pl. 67. cites 11 H. 4. 11.

13. In *dower* the tenant *pleaded that the baron had nothing but jointly with J. N. who survived and is yet alive; the feme may re-*

Issue was taken that A. had no such daughter as J. who survived him. 11 H. 4. 11. b. pl. 23.



that *seisheque dower* she may have contra this special matter, because the survivor had released to her baron in his life time, which release the feme cannot plead. Br. Averment, pl. 68. cites 11 H. 4. 83.

14. In *formedon* the tenant said that he leased to the donor for life, who gave and he entered for the forfeiture; the demandant replied, that the donor was seised after this, and gave, & non allocatur, without shewing how he came to it after, by which he said that he was seised after, and incoffed the donor, who gave. Br. Averment, pl. 78. cites 3 H. 4. 17.

15. In *dower* the tenant pleaded that the land was given to the baron and his first feme in special tail; the feme replied that *seisheque dower* &c. & non allocatur; whereupon she said that the baron was seised in fee *absque hoc*, that the donor gave. Br. Averment, pl. 77. cites 2 H. 5. 4.

16. In *maintenance* the whole Court held, that where the plaintiff alleges special maintenance, as by giving money to the sheriff to arrest the plaintiff in a suit between him and J. N. he shall not say that he did not maintain *de modo & forma* contrary to such special maintenance; but in general declaration of maintenance, ne maintaina, prius &c. is a good plea. Br. Averment, pl. 73. cites 12 E. 4. 14.

For more of Averment in general, see Amendment and Joinders, Conclusions of Pleas, Declarations, Devise, Fines (I. b. 2) to the end of (I. b. 6) Per J. Romen, Records, Return, Trespass, Writs, and the other proper titles.

## Avowry.

### (A) Where *Seisin* is necessary to avow.

Fol. 314.

[1. IF a man makes a gift in tail, rendering rent, he may avow without laying any *seisin*, because the reversion gives him a sufficient privity, and he shall count upon the reservation. 8 H. 6. 18.]

Br. Avowry, pl. 52. cites S. C. & S. P. per Cott.

2. A man may distrain who never was seised. Br. Rescous, [ 372 ] pl. 23. cites 5. E. 4. 6.

3. In an avowry, *seisin in law* is sufficient, by the intention and express words of the statute 32 H. 8. cap. 2. which are actual possession

And. 57. 58. pl. 133. Parker v. Francis,

S. C. ad-  
judged ac-  
cordingly  
for the avowant.

*seffion or seifin in the disjunctive*; resolved 4 Rep. 10. b. Mich. 17  
& 18 Eliz. C. B. Bevill's Case.

## (A. 2) What an Avowry is, and the several Sorts thereof.

1. **T**HE matter of avowry does *not arise out of the right or interest* which a man has in the land, *but out of the privity*; as when the tenant makes a feoffment, he has neither right nor interest in the land, yet the lord is not compellable to avow upon the alienee before notice. In a præcipe quod reddat, the tenant alieneth, yet he remains tenant as to the plaintiff, and yet he has not either right or estate as to the alienee. Arg. Godb. 302. cites 5 E. 4. 3. a. 48 E. 3. 8. b. 20 H. 9. 9. 14 H. 4. 38. b.

Br. Avowry,  
pl. 95. S. C.  
per Choke  
& Littleton.

2. Avowry is in lieu of action, if the defendant prays return, *contra* if he does not pray return; for then it is a bar only. Br. Pleadings, pl. 97. cites 6 E. 4. 11.

Cited in to-  
tidem ver-  
bis, by Ray-  
mond J.

Raym. 257.  
Hill. 30 &  
31 Car. 2.  
C. B. in the  
Case  
Johnson v.  
Grant.

3. There are 4 sorts of avowries; 1st, by reason of a tenure when the lord hath fee in his seignory, and the tenant hath fee in the tenancy, ut super verum tenentem suum in forma prædicta.

2. Upon one as his very tenant by the manner, ut super verum tenentem suum in forma prædicta, viz. When the tenant makes a lease for life, or a gift in tail, as upon his very tenant by the manner. 3. Upon one as his tenant by the manner, omitting this word (*very*) and that is when the lord hath a particular estate in the seignory, as an estate in tail, for life, or less interest, super tenentem suum in forma prædicta; so shall the donor upon the donee, the lessor upon the lessee for life or years. 4. Upon the matter in the land as within his fee and seignory; as where the tenant by chivalry makes a lease for life, rendering rent and dies, his heir within age, the guardian shall so avow upon the lessee, super materiam prædictam in terris prædictis ut infra feodum suum. Co. Litt. 269. a. b.

4. Avowry is in nature of a declaration, if that be vicious no judgment can be given for the avowant. Brownl. 183. Darcy v. Langton.

5. Avowry is where one takes a distress for rent or other thing, and the other sueth a *replevin*, then he who took it must justify for what cause he took it; and if he took it in his own right he must shew it, and avow the taking; and if in the right of another he must then make consuance as bailiff. L. P. R. 157. cites Terms of the Law 38. a.

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## (B) What Act shall be a good Seifin.

Br. Avowry,  
pl. 51. cites  
8 H. 6. 10.  
S. P. agreed,

[1. **A**N attornment in a court of record in a *per que servitia* is a good seifin to avow, because this is with the doing of fealty. 8 H. 6. 17. b.]

that

that it is a good seisin to make avowry for other services; but Brooke says, it seems that he shall allege seisin in the consuror or his ancestors &c.—Br. Seisin, pl. 33. cites S. C. and by Marten seisin of fealty by attornment is sufficient.

[2. If the tenant which owes suit of court be amerced for the not doing thereof, and he pays the amercement to the lord, this is a good seisin of the suit. 12 H. 7. Kell. 3. b. per Curiam. 13 H. 7. 16.]

[3. [So] if the tenant makes \* fine with the lord for his suit, in the Court of the lord, this is a good seisin of the suit. 13 H. 7. 16.]

Where a man makes avowry upon one who holds to be

attendant to his lord, and makes suit, and alleges seisin of soc. for the suit, this was held no seisin of the suit. Br. Avowry, pl. 90. cites 12 H. 7. 15.

\* [Or pays him a sum of money by way of agreement to release him of his suit.]

[4. So if the tenant delivers a horse to the lord for his rent due, and the lord agrees thereto, this is a good seisin of the rent. 12 H. 7. 3. b. Kell.]

Kell. 3. b. in pl. 6. Mich. 12 H. 7. S. P. per Curiam, obiter.

[5. In an avowry for suit, if the lord recovers damages for the suit, this is a sufficient seisin of the suit. Co. 4. Bevil 9. b.]

6. A man held of the King and of another lord, and died, by which both the lands came into the hands of the King by primer seisin, and before livery the lord got seisin by the hands of the heir, and had no other seisin, and this seisin was held sufficient seisin to make avowry; per Keble, Vavifor, and Brian, but Frowike contra. Br. Seisin, pl. 51. cites 13 H. 7. 15.

### (C) [Seisin] By whom in respect of the Estate it shall be good. Homage.

[1. IF homage be due in the right of the feme, and the baron does homage before issue had, this is no good seisin against the feme and her heirs to have an avowry. 11 H. 4. 29.]

Br. Avowry, pl. 43. cites 11 H. 4. 28. and at the end of

the plea says, it seems that seisin of homage by the baron only is not good, unless it be after that he has issue by his feme.—Fitzh. Avowry, pl. 54. cites S. C.

[2. But otherwise it is if he does homage after issue. 11 H. 4. 29.]

Br. Avowry, pl. 43. cites S. C.—

Fitzh. Avowry, pl. 54. cites S. C.—S. P. admitted, Kelw. 24. a. pl. 8. Pasch. 21 H. 7.

[3. Seisin of homage by the hands of a disseisor is good to avow. 11 H. 4. 29. b.]

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Br. Avowry, pl. 43. cites 11 H. 4. 28.

S. C. & S. P. held by some.—Fitzh. Avowry, pl. 54. cites S. C. & S. P. by Thirna.

(D) [*Seisin of*] other Services. [*By whom in respect of Estate.*]

Br. Avowry, pl. 52. cites 8 H. 6. 16. [1. **SEISIN** of services *by the hands of a lessee at will* is not good to bind the tenant. 8 H. 6. 1. 7. 32.]  
S. P. —  
Fitzh. Avowry, pl. 8. cites 8 H. 6. 16. S. P.

[2. *Seisin of services by the hands of a lessee for years* shall not bind the lessor. 2 H. 6. 2. b.]

Br. Avowry, pl. 52. cites S. C. and S. P. per Cott. [3. If the *tenant pays the services to the lord paramount*, this *seisin by his hands shall bind the mesne &c.* 8 H. 6. 17.]  
Cott. Quod non negatur; but says Quære inde. — Fitzh. Avowry, pl. 8. cites S. C.

Br. Avowry, pl. 52. cites 8 H. 6. 16. [4. *Seisin by the hands of a disseisor* is a good *seisin*, and shall bind the *disseisee*, although he *re-enters for the services due.* Dubitatur 8 H. 6. 18.]  
by Strange, that if the lord gets *seisin* by the hands of the disseisor of that which of right he ought to have, and the disseisee re-enters, the lord shall make avowry for this *seisin*, but as to any surplusage he shall avoid it. — Fitzh. Avowry, pl. 8. cites S. C. and S. P. by Strange accordingly. — Br. *Seisin*, pl. 12. cites S. C. and S. P. accordingly, by Strange.

Br. Avowry, pl. 52. cites 8 H. 6. 16. [5. If the *discontinuee* gives *seisin* of the services, this will bind the issue, though he *recovers in a formedon.* 8 H. 6. 18.]  
S. C. & S. P. by Strange. — Br. *Seisin*, pl. 12. cites S. C. & S. P. by Strange.  
And per Cott. the donor there may make avowry without any *seisin* before, by reason that the reversion is in him. Br. *Seisin*, pl. 12. cites 8 H. 6. 18. per Strange.  
So in other cases of reversion. Ibid.

[6. If the *baron, tenant in the right of his feme*, gives *seisin* of the services during the coverture, this will bind the feme and her heirs. 12 Ed. 3. Avowry 104.]

Fol. 315. [7. So if the *tenant by the curtesy* gives a *seisin* of the services, this will bind the heir. 12 Ed. 3. Avowry 104.]

Kelw. 84. a. pl. 8. Pasch. 21 H. 7. by Kingsmill, contra; and so of any such particular tenant for life, because after their death none can have their estate.

[ 375 ] (E) By whose Hands. *Tenant in Right.*

[1. **SEISIN** of services by the hands of a tenant in right, is a good *seisin* to avow; as by the hands of a *disseisee.* 8 H. 6. 17. and this will bind the disseisor.]

[2. If the *tenant aliens, a seisin by his hands after* is good before notice of the alienation. 8 H. 6. 17. for he is tenant in right before notice, and this will bind the alienee.]

[3. If an *alienation be by fine of a seignory*, and after the *tenant aliens*, yet a *seisin by his hands in Court after* is good, because he

he that was tenant at the note levied ought to attorn. 8 H. 6. 17. b.]

(F) Seisin by whom, shall serve for others to avow.

[1. SEISIN by tenant in tail is not sufficient for the remainder in fee of the feigniory. 45 Ed. 3. 28.]

[2. If a fine be levied to one for life, the remainder to another in tail of a manor, if the tenant for life takes seisin of the services, this will be a good seisin for him in the remainder in tail to avow. 20 H. 6. 7. Curia.] Fitzh. Avowry, pl. 11. cites S. C.

[3. So a fortiori, if the conveyance was by deed. 20 H. 6. 7.] Fitzh. Avowry, pl. 11. cites S. C.

[4. The seisin of services by an abbot shall be sufficient for his successor to avow. 34 H. 6. 46. per Curiam.] Successor may avow by the seisin of his predecessor. Br. Avowry, pl. 15. cites S. C. ——— Fitzh. Avowry, pl. 25. cites S. C. accordingly.

Avowry for relief after the death of an abbot was awarded good; for it was by prescription. Quære by the common law; for there is succession, and no descent. Br. Avowry, pl. 128. cites 3 H. 4. 2.

[5. If a feme feigniorefs hath seisin of the services due at one time, and after takes husband, and hath issue, and dies before other seisin, the seisin of the feme before coverture is not sufficient for the baron, tenant by the curtesy, after the death of the fee feme, to avow. Quære. 1 Ed. 3. 6. b.]

(G) In what Cases Seisin of one Thing shall serve for another to avow. Homage.

[1. SEISIN of escuage is sufficient to avow for relief. 4 Ed. 2. Avowry 200. per Scrope.]

[2. [So] seisin of homage is sufficient to avow for relief. \* 13 H. 4. 5. b. 20 Ed. 3. Avowry 131.] \* Br. Tenure, pl. 85. cites 13 H. 4. and Fitzh. tit. Avowry, 197. ——— Fitzh. Avowry, pl. 197. cites Hill. 13 H. 4. 5. [ 376 ]

[3. [So] seisin of homage is sufficient to avow for escuage. \* 13 H. 4. 5. b. tempore Ed. 1. Avowry 229. by the Justices.] Fitzh. Avowry, pl. 197. cites S. C.

[4. Seisin of rent is sufficient to avow for relief. 4 Ed. 2. Avowry 200. per Scrope.]

[5. Seisin of escuage is a sufficient seisin of homage, because escuage draws to it homage. 21 Ed. 3. 52. 3 Ed. 2. Avowry 187. adjudged, 5 Ed. 2. Avowry 209. Adjudged 19 Ed. 2. Avowry 224. dubitatur. 13 Ed. 3. Avowry 103.] S. P. Br. Tenures, pl. 90. cites 21 E. 3. Fitzh. Avowry, 85. and Fitzh.

Avowry, 115. 22 E. 3. ——— Br. Seisin, pl. 31. cites 21 E. 3. and Fitzh. Avowry, 115. S. P.

[6. Seisin of *rent* shall be a seisin of *fealty*. 29 Ed. 3. 24, adjudged.]

Br. Seisin,  
pl. 4. cites  
44 E. 3. 11.

7. Seisin of *fealty* suffices to make *avowry* for all other services. Br. Seisin, pl. 49. cites 44 E. 3. and Fitzh. Avowry 71.

S. C. — Br. Avowry, pl. 24. cites S. C. — Tenant holds by *homage, fealty, escuage, and suit of court twice a year*, it was resolved that seisin of the fealty was seisin of all the services; for when the tenant does fealty he takes a corporal oath to be true and faithful to the lord, for the tenements that he claims to hold of him, and that he will lawfully do the customs and services which he ought to do to him; and it is observable that the words (being faithful and true &c.) are likewise parcel of the words of the homage, and seisin of part of any service is seisin of the whole, which is the reason the law makes so great account of the seisin of the services of homage and fealty. 4 Rep. 8. a. b. Mich. 17 & 18 Eliz. C. B. Bevil's Case. — And. 57, 58, pl. 123. S. C. by the name of Parker v. Francis, adjudged accordingly, and says that it would otherwise be very inconvenient; because it might possibly happen that one may not have seisin of all the services in 100 years, for homage is to be done by tenant in fee, or estate of inheritance only, and escuage is not payable annually.

\* Ibid. says this point was so adjudged Pasch. 1 & 2 Ph. & Mar. in C. B. and that so it was adjudged 29 E. 3. 31. a. and that with this accords 3 E. 2. Avowry 188. — 4 Rep. 9. a. the reporter adds a nota thus, viz. Nota, reader, that all this which has been said is to be intended of seisin in law, and not of actual seisin; for seisin of fealty in the case at bar is not actual seisin of homage, nor of suit to

8. Seisin of a *superior service* is seisin of all inferior services which are incident thereto, as seisin of *escuage* is seisin of *homage and fealty*, and seisin of *homage* is seisin of *fealty*, and \* seisin of the *rent* is seisin of *fealty* where the *seignior* is by *fealty and rent*. Resolved. 4 Rep. 8. b. in Bevil's Case.

9. It was resolved that doing of *homage* is seisin for all services as well inferior as superior; because in doing of homage he takes upon himself to do all the services. 4 Rep. 8. b. in Bevil's Case, and that with this agrees 13 H. 4. 5. that seisin of homage is seisin of escuage which is superior, and of relief which is inferior.

10. Seisin of *rent* or *suit*, or other service which is annual, is sufficient seisin of *escuage, homage, ward, relief, heriot service, service of covering the hall of the chief manor house, or of impaling the lord's park, or such casual services* which perhaps might not happen in 40 or 70 years. 4 Rep. 8. b. 9. a. in Bevil's Case, and cites 20 E. 3. Tit. Avowry, 131. S. P.

11. But it was said, that seisin of one annual service is not seisin of another annual service; as if lord and tenant by fealty, rent of 10s. and 3 work-days in a year, seisin of the work-days, nor seisin of rent is not seisin of suit of court which is annual; for it shall be reckoned the lord's folly that he did not get seisin of what was due annually, and it will be mischievous to the tenant, because peradventure the work-days were long since discharged, but now cannot be shewn, whereupon suits and troubles may ensue. 4 Rep. 9. a. in Bevil's Case.

nor of suit to the court; nor seisin of fealty is not actual seisin of rent.

12. If a man recovers rent of 20d. per ann. and the sheriff puts him in possession by 2d. of the money of the plaintiff, yet at the rent-day the recoverer may avow for the whole 20d. and not only for 18d. Per Danvers and Danby. The reason seem to be inasmuch as he cannot expound the 2d. to be parcel of the rent; for the rent is not due till the day, and yet this is good seisin, tho' it be only a sum paid in name of seisin of the rent. Br. Seisin, pl. 15. cites 37 H. 6. 38.

13. In *avowry* for *rent*, alleging the *seignior* to be *fealty* and *rent*,

Where the  
seignior  
reside in

rent, the lord shall not give in evidence upon hors de son fee pleaded that he has been seised of the rent; for seisin of the rent is no seisin of the fealty, or of other services; per Fitzherbert and Shelly. Br. Seisin, pl. 1. cites 27 H. 8. 21.

draws the fealty to him. Br. Seisin, pl. 49. cites 13 E. 3. and Fitzh. Avowry, 103. and concordat 29 E. 3. and Fitzh. Avowry 250. and 3 E. 2. Fitzh. Avowry, 188. and good reason; for by grantor recovery of the rent the fealty shall pass. — And seisin of \* *escuage* is seisin of the *homage*. Ibid. cites 21 E. 3. and Fitzh. Avowry 115. and 209. — But if the *seignior* was by *homage*, *fealty*, and *rent*, it seems that the seisin of the rent is not seisin of *homage*. Br. Seisin, pl. 44. — \* Br. Seisin, pl. 41. cites S. C.

rent and fealty, seisin of the rent is seisin of the fealty, in as much as the rent

14. In replevin, the defendant made consufance as bailiff to B. who was seised of the manor of C. and the plaintiff was seised of the locus in quo &c. and held the same of the said B. as of his manor of C. by *escuage*, *homage*, *fealty*, and *rent*, and alleged seisin of the rent by the hands of the plaintiff, and so avowed for *homage* not done; the plaintiff demurred, because he did not shew of what rent he was seised by the hands of the tenant, and that he should have said, of what services he was seised; but judgment was given for defendant, and that judgment affirmed, and difference was taken where he alleges seisin of the rent by the hands of his ancestor, there he shall exprefs of what services, but where he alleges seisin by his own hands, the last pleading is good. 2 Roll Rep. 392. Mich. 21. Jac. B. R. Whiteguift v. Hildershampe.

Hutt. 50. Whiteguift v. Eldersham. Trin. 20 Jac. S. C. and judgment for the defendant. — Win. 1. Pasch. 20 Jac. C. B. Whiteguift v. Barrington, S. C. and Finch at the bar being of counsel with the a-

vowant said, that till the resolution in Bevil's Case, it was a great question, whether the seisin of the rent was the seisin of the *homage*; & *adornatur*; but afterwards judgment was given for the avowant.

## (H) Who may change the Avowry.

Fol. 316.

[1. A Bailiff who hath power to collect rents cannot change the avowry of his lord, as by the acceptance of rent. 41 Ed. 3. 26. b. for he cannot prejudice his lord.]

Br. Avowry, pl. 19. cites 41 E. 3. 25. S. P. by

Finch. and Thorpe. — Fitzh. Avowry, pl. 65. cites S. C. and S. P. — Br. Baille, pl. 3. cites S. C. and S. P. by Thorpe and Finch. for he has power to receive his master's rents, but not to change his tenant; *quære*, for it is not adjudged. — He may receive rents of old tenants, but he cannot accept new upon change of tenants; per Hobart Ch. J. Hob. 154. at the bottom of the page. — He cannot change the avowry of his master; resolved. 5 Rep. 79. a. Pasch. 43 Eliz. B. R. Pilkington's Case.

[2. A guardian cannot change the avowry of the heir. 48 Ed. 3. 10.]

Br. Avowry, pl. 31. cites 48 E. 3. 8. S. P.

S. P. — Fitzh. Avowry, pl. 83. cites S. C. & S. P.

[3. An infant lord cannot, during his nonage, change his avowry by his assent. 48 Ed. 3. 10.]

Fitzh. Avowry, pl. 83. cites S. C.

(I) Upon whom it may be. *Baron and Feme.*

[1. **A**N avowry shall be made upon baron and feme before issue for all the services due in the right of the feme. 10 H. 6. 11. b. 39 E. 3. 15. 13 H. 6. Avowry 21. Curia.]

\* Br. Avowry, pl. 132. cites S. C. and says, Nota, per Paston,

[2. And after issue the avowry shall be made upon baron and feme for services due in the right of the feme, other than homage. 10 H. 6. 24. b. Curia. 13 H. 6. Avowry 21. Curia. Contra \* 8 H. 6. 14.]

when baron and feme are seised in jure uxoris, the lord, after issue, may make his avowry upon the baron only if he will.——S. P. agreed, that it may be upon the baron only. Br. Avowry, pl. 22. cites 43 E. 3. 13.

In recordare, the defendant avowed upon the baron in right of his wife, be-

[3. So after issue the avowry shall be made upon the baron only for homage due in the right of the feme, because of his title to be tenant by the curtesy. 10 H. 6. 24. b. Curia. 13 H. 6. Avowry 21. Curia. 18 Ed. 3. 7.]

[4. But an avowry for homage after issue may be made upon the baron and feme also. 43 Ed. 3. 13.]

cause land was given in tail, rendering 20l. rent, and conveyed the land to A. feme of the plaintiff, and for the rent avowed upon the baron only, and he prayed aid of his feme and had it, and they came and pleaded in abatement of the avowry, because it was not made upon the feme, and because he had aid of her before, therefore he was ousted of it, and the feme was also ousted, tho' she did not come till now, quod nota; quod miror; for it seems that the avowry is erroneous by matter apparent, which is cause to replead and to have writ of error at this day. Br. Avowry, pl. 74. cites 39 E. 3. 15.——Br. Avowry, pl. 22. S. P. cites 43 E. 3. 13. but it lies not against the baron alone till he has issue.——S. P. but this need not be alleged in the Avowry; but if they have no issue, the baron and feme may allege it. Br. Avowry, pl. 27. cites 44 E. 3. 41.——Hutt. 50. S. C. cited accordingly.

## (K) Who may compel the Lord to avow upon him.

\* Br. Avowry, pl. 19. cites 41 E. 3. 25 S. C. but I do not observe S. P. there.——Fitzh. Avowry, pl. 65. cites S. C. & S. P. [1. **I**F a man comes to the tenancy by disseisin, or by another manner, so that it be a fee, and the lord accepts the services of him, he shall compel the lord to avow upon him. \* 41 Ed. 3. 26. Contra † 48 Ed. 19. Quære.]

† Br. Avowry, pl. 31. cites 48 E. 3. 8. S. P.——Fitzh. Avowry, pl. 83. cites S. C.——[And Roll seems to be misprinted (19).]

Fitzh. Avowry, pl. 12. cites S. C.

[2. The very lord shall not be forced to change his avowry where he avows upon his very tenant by the manner, or his tenant by the manner, unless the tenancy comes lawfully out of the person of his tenant. 20 H. 6. 9. b.]

\* Fitzh. Avowry, pl. 65. cites S. C.——Br. Avowry, pl. 19. cites S. C. but seems not to be exactly S. P.

[3. If there be tenant in tail, the remainder in fee, and the tenant in tail make a feoffment, the feoffee shall not compel the lord to avow upon him. \* 41 Ed. 3. 26. b. † 48 Ed. 3. 8. b. 14 H. 4. ¶ 20 H. 6. 9. b.]

[4. If tenant in tail makes a feoffment in fee, the feoffee cannot compel the lord to avow upon him, because he is not tenant in tail. 18 Ed. 3. 7.]

[ 379 ]     ¶ Br. Avowry, pl. 32. cites S. C.——Fitzh. Avowry, pl. 83. cites S. C.——In replevin one as guardian of the heir of the donor in tail avowed upon the feoffee of the tenant in tail;



*tail; and the plaintiff who was issue in tail pleaded the gift in tail, and how he is heir in tail, and concluded in abatement of the avowry, because it ought to be made upon him, and not upon the discontinuee.* But per Finch. Perlay, Fulthorp, and the best opinion, if the heir in tail be party, as here, he shall abate the avowry, and shall compel the donor or his heir to avow upon him; but it was agreed, that the *discontinuee is tenant in possession*, and writ of ward lies of his heir, and cessavit lies against him, *but the heir in tail is tenant in right*, and the avowry is in the right, *therefore if the issue in tail be party, he shall abate the avowry.* Br. Avowry, pl. 31. cites 48 E. 3. 8. — But Ibid. says, that some held that the *feoffee may compel the lord to avow upon him if he will*, but then it seems he shall lose the reversion. — The avowry shall be upon the *feoffee.* — Br. Avowry, pl. 94. cites 5 E. 4. 3. — None shall do *homage* nor *corporal service* but the *tertenant* or *tenant in fact*; as where donee in tail aliens, yet the avowry by the donor shall be upon the donee, for he is *tenant in fact.* Br. Avowry, pl. 96. cites 7 E. 4. 27. by Danby v. Choke. ¶ Fitzh. Avowry, pl. 12. cites S. C.

[5. If a man recovers against tenant in tail, he may compel the lord to avow upon him. 41 Ed. 3. 26. b.] *And by recovery the lord shall change his avowry without notice.* Br. Avowry, pl. 146. cites 29 H. 8.

[6. [So] If a man recovers against my very tenant by default, he may compel me to avow upon him, tho' he recovers without title. 48 Ed. 3. 9.] *If a man recovers against the tenant by title, or without title, the lord must change his avowry.* Br. Avowry, pl. 77. cites 37 H. 6. 30. — Ibid. pl. 111. cites 29 H. 8. S. P. accordingly; if the recoveror be in by descent.

So if one recovers against my tenant by elder title, I shall be compelled to avow upon him without notice. Br. Avowry, pl. 96. cites 7 E. 4. 27.

[7. If there be tenant for life, the remainder in fee, tenant for life may compel the lord to avow upon him. 45 Ed. 3. 27. b.] *Br. Cessavit, pl. 9. cites S. C. & S. P. But contra where the donor has the reversion.*

[8. If my very tenant is disseised, yet he may compel me to avow upon him. \* 11 H. 4. 29. Lit. 106. b. 17 Ed. 3. 64.] *\* Br. Avowry, pl. 43. cites 11 H. 4. 28. S. C. but I do not observe S. P. there. — If disseisor dies seised, and his heir is in by descent, I shall be compelled to avow upon him without notice.* Br. Avowry, pl. 96. cites 7 E. 4. 27. — Ibid. pl. 111. cites 29 H. 8.

[9. If my very tenant be disseised, and I accept the services from the disseisor, yet the disseisee may compel me to avow upon him. 48 Ed. 3. 9.] *Br. Avowry, pl. 31. cites 48 E. 3. 8. S. C. —*

Fitzh. Avowry, pl. 83. cites S. C. — If after acceptance of the disseisor by the lord, for his tenant, the *disseisee re-enters*, the lord shall avow upon the disseisee without notice, and ought to take notice thereof. Br. Avowry, pl. 77. cites 37 H. 6. 30. per Prisot Ch. J.

[10. If my very tenant be disseised, and dies, his heir may compel me to avow upon him. 2 Ed. 4. 6.] *\* Fol. 317.*

Fitzh. Avowry, pl. 31. cites S. C. and by Littleton, I shall avow upon his issue, and Danby agreed it to be true, because I am not compelled to take notice of the disseisin, nor was he ever tenant in right to me; [but nothing is said of the heirs compelling me to avow upon him.] — Br. Avowry, pl. 77. cites 37 H. 6. 20. that if the lord takes the disseisor for his tenant, and the disseisee re-enters, the lord shall avow upon the disseisee without notice, and ought to take notice thereof; per Prisot Ch. J. — Br. Judgment, pl. 51. cites 39 H. 6. 23. S. P. by Prisot. — If *disseisor gives in tail by fine, remainder over*, and tenant in tail dies without issue, and he in remainder re-enters, and the *disseisee dies without issue*, in such case Brooke thought that the lord ought to change his avowry without notice by reason of the fine; but otherwise on feoffment of disseisor. See Br. Avowry, pl. 34. cites 3 R. 2.

And the *heir or alienee of the disseisor by tender of the services* shall compel the lord to avow upon him; for they are *in by title*. Br. Avowry, pl. 39. cites 7 H. 4. 17. — Br. Entre Cong. pl. 2. cites S. C.

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\* Br. Avowry, pl. 97. [11. If the *tenant makes a feoffment*, the *feoffee cannot compel* the lord to avow upon him *before notice*. 4 H. 6. 20. \* 8 Ed. cites S. C. 4. 12. But † *after notice he may* compel the lord to avow upon him. & S. P. accordingly. 4 H. 6. 20.]

— Fitzh. Avowry, pl. 35. cites S. C. & S. P. accordingly, by Markham and Yelverton. — Br. Avowry, pl. 96. cites 7 E. 4. 27. S. P.

† Br. Avowry, pl. 77. cites 37 H. 6. 30. S. P. — Br. Judgment, pl. 51. cites 39 H. 6. 23. S. P. per Prisot.

Where notice is necessary it *shall be made upon the land*, and he, that gives it, ought at the same time to tender the arrears. Br. Avowry, pl. 111. cites 29 H. 8.

Fitzh. Avowry, pl. 31. cites [12. So if the *feoffee dies before notice*, his *heir may* compel the lord to avow upon him, for there the *law changes the avowry*. S. C. — 4 H. 6. 20. b. 2 Ed. 4. 6. per Curiam.]

Br. Avowry, pl. 93. cites 2 E. 4. 5. S. C. & S. P. For a right descended to him, and the lord is not bound to take notice of the disseisin, tho' it is a tort; per Danby Ch. J. — Br. Avowry, pl. 15. cites 34 H. 6. 46. S. P. by Prisot; for descent is a title in him in law.

Br. Avowry, pl. 97. cites [13. If the *tenant aliens parcel* of the land, yet the lord shall not be forced to change his avowry without *notice*, tho' the statute be, that the alienee of parcel attendat capitali domino pro particula illa. 8 Ed. 4. 12.]

— Fitzh. Avowry, pl. 35. cites S. C. & S. P.

\* Fitzh. Avowry, pl. 31. cites [14. If the *tenant aliens in fee, and dies before notice*, now the *alienee* may after compel the lord to avow upon him. Co: 3. Pennant 66. 29 H. 8. 108. \* 2 Ed. 4. 6. per Curiam; for he cannot avow upon the heir of the first tenant, because nothing is descended to him.]

S. C. & S. P. — But during the life of the feoffor the feoffee cannot compel the lord to avow upon him without notice. Br. Avowry, pl. 15. cites 34 H. 6. 46. — And after the death of the feoffor the lord may avow upon the feoffor's heir till notice. Ibid. per Moyle. Ad quod non fuit responsum.

[15. If *tenant in dower grants over her estate*, yet the reversioner ought to avow upon her. 11 H. 4. 19.]

S. P. Br. Avowry, pl. 110. cites [16. If the *tenant aliens*, and the *alienee gives notice thereof* to the lord, yet the alienee cannot compel the lord to avow upon him *without tender of all the arrearages*, because if the lord \* avows upon him before they are paid, or accepts the services of the alienee, he shall lose the arrearages incurred before the alienation, inasmuch as he cannot avow for them upon the alienee. Co. 3. Pennant 66.]

But Brooke says this seems to be where *feoffment is made of the entire land, and where it is held by rent which is severable*. But *contra* where the feoffment is of *parcel, and the rent not severable*.

\* S. P. — If the lord accepts the service of the alienee before the arrearages paid, he will lose his arrearages. Br. Avowry, pl. 111. cites 29 H. 8.

[17. If the *tenant in chivalry dies*, his *heir of full age*, by which

which relief is due, and the alienee gives notice thereof to the lord, yet he cannot compel the lord to avow upon him before the relief paid, because then the lord would lose the relief. 4 Ed. 3. 22. Avowry 163. per Wilby.]

[18. If the mesne grants his mesnalty by fine, though there is no attornment of the tenant, yet the lord paramount might avow upon the grantee, because he was his tenant in fact, yet he was compellable to avow upon him. Lit. Attornment 131.]

[19. But in this case, if the grantor dies without heir in the life of the grantee, the grantee may compel the lord to avow upon him. Lit. Attornment, 131. b.] [ 381 ]

20. Avowry was changed by fine levied by the tenant sur nuisance de droit come ceo &c. without notice, as admitted there; for the defendant did not traverse \* the dying [seised] in his homage. Br. Avowry, pl. 51. cites 38 E. 3. 7.

Br. Notice, pl. 3. cites S. C.  
\* All the editions are (demurrant), (le morant.)

but it seems it should be

21. Disseisor nor discontinuée shall not compel the lord to avow upon him. Br. Avowry, pl. 31. cites 48 E. 3. 8.

22. If lord and tenant are, and the tenant gives in tail, remainder over in fee, the avowry shall be upon the tenant in tail, as upon his very tenant by the manner; but where the donor avows upon the donee in tail, he shall conclude upon his tenant by the manner. Br. Avowry, pl. 10. cites 20 H. 6. 9.

23. If a man gives land in tail rendering rent, and the tenant in tail aliens, and the alienee dies, and his issue enters, the donor shall make avowry upon the tenant in tail, and not upon the issue of the alienee; but Haidon contra, and that the avowry shall be upon the issue of the alienee; for otherwise if the donor avows for more services than are due, the issue has no remedy. Br. Avowry, pl. 94. cites 5 E. 4. 3.

24. So if the tenant in tail has issue, and dies. Quære; for it seems that the donor may avow upon the issue in tail, if he will. Ibid.

25. In avowry coparceners made partition, and agreed that the one should pay the rent to the lord for all, and the lord after avowed upon him alone, and alleged seisin by his hands only, where he ought to avow upon all. Per Brian, the plaintiff shall have the special matter entered, absque hoc that he was seised of this portion in other manner. Br. Avowry, pl. 149. cites 10 H. 7. 29.

If two coparceners make partition, and give notice to the lord, he shall change his avowry. Br.

Avowry, pl. 146. cites 29 H. 8.

26. If a man sells his land by deed, indented and inrolled within the half year, according to the statute of 27 H. 8. the avowry is not changed without notice. Br. Avowry, pl. 111. cites 29 H. 8.

Br. Avowry, pl. 146. cites S. C.

(L) In what Cases the *Lord* hath *Election* upon whom he will avow.

[1. IF the *mesne releases to the tenant*, yet the lord may avow upon the *mesne*. 45 Ed. 3. 10. b.]

But the very lord

[2. The lord may avow upon the *disseisor*. 2 H. 6. 9. b.]

shall not be compelled to change his avowry, unless the tenancy comes lawfully out of the person, his tenant; per Norton. Fitzh. Avowry, pl. 12. cites 20 H. 6. 9. — If the *heir of the disseisor be party*, he shall abate the avowry, and compel the lord to avow upon him; [for the heir of the disseisor is tenant in right, tho' the disseisor be tenant in possession, and the avowry is in the right.] Br. Avowry, pl. 31. cites 48 E. 3. 8. per Finch.

\* Fitzh. Avowry, pl. 12. cites S. C. [3. If the *tenant in tail aliens in fee*, yet the donor may avow upon him. 19 H. 6. 61. \* 20 H. 6. 9. b. 18 Ed. 3. 7. † 7 Ed. 4. 28. 15 Ed. 4. 13.]

† Br. Avowry,

pl. 9<sup>c</sup>. cites S. C. & S. P. by Danby and Choke; for the tenant in tail is tenant in fact. — [382] Fitzh. Avowry, pl. 36. cites S. C. and by Littleton and Danby, tho' donee in tail aliens in fee, yet he shall do homage to the donor; for he remains always tenant to him.

Notwithstanding such discontinuance, yet the donor shall avow upon him, and afterwards upon his issue; per Hanke. Br. Avowry, pl. 46. cites 14 H. 7. 37, 38.

\* Br. Avowry, pl. 11. cites 48 E. 3. 8. S. C. [4. [But] if the donee in tail aliens in fee, the lord can not avow upon the *feoffee*, for then he will abate his own avowry, in as much as he alleges a gift. \* 48 Ed. 3. 8. b. Trebony's Avowry 14. † 14 H. 4. 37. b. Contra † 20 H. 6. 9. b.]

— Fitzh. Avowry, pl. 83.

cites S. C. † Br. Avowry, pl. 48. cites S. C. † Fitzh. Avowry, pl. 12. cites S. C.

Br. Avowry, pl. 48. cites 14 H. 4. 37, 38. S. C. & S. P. by Hanke. [5. So if the donee aliens *with warranty*, and in a *formedon the issue is barred by a warranty and assets*, by which the tail is perpetually bound, yet the donor ought after to avow upon the *issue*. 14 H. 4. 39.]

[6. If the *tenant makes a feoffment in fee*, the lord may avow upon him before notice. \* 14 H. 4. 38. 4 H. 6. 20. † 8 H. 6. 17.]

\* Br. Avowry, pl. 48. cites S. C.

† Br. Avowry, pl. 52. cites 8 H. 6. 16. S. C.

Fitzh. Avowry, pl. 8. cites S. C. but I do not observe S. P. in either of these books.

Br. Avowry, pl. 96. cites E. 4. 27. S. C. & S. P. — [7. If the *tenant aliens in fee*, the lord can not avow upon the *ancient tenant for homage, fealty, suit, or other corporal service* to have a return for it, *though he had no notice* of the alienation, because he shall not have these services of him. 7 Ed. 4. 28.]

Fitzh. Avowry, pl. 36.

cites S. C. and 8 E. 4.

S. P. accordingly by Keble, because the charge of the rent goes with the land; and he was likewise of opinion, that if the tenant when the rent is arrear makes a feoffment of one moiety to A. and of the other moiety to B. and afterwards the tenant dies without heir, the lord may avow upon which of the feoffees he please, because each of them is charged

[8. If the *tenant aliens*, the lord may avow upon the *alienee before any notice* given him, if he will. 7. Ed. 3. 33. Avowry 147. per Herle.]

charged with the entire rent, &c. Kelw. 123. pl. 45. *Casus incerti temporis*.—See Litt. f. 457. and Ld. Coke's Commentaries upon it.

9. Where two coparceners of land held by suit of Court make partition, and the one aliens to one his part, and the other aliens to another his part, the lord may distrain which he pleases, and avow upon him only; for upon several tenants a man shall not make joint avowry, and if the one makes the suit it discharges the other, and he may plead it; per Skip. *Quod nemo negavit*. Br. Avowry, pl. 69. cites 24 E. 3. 34.

10. Where there are lord, mesne and tenant, the lord may avow upon the mesne for homage; for he is tenant in fact. Br. Avowry, pl. 96. cites 7 E. 4. 27.

## (L. 2) Who may avow.

1. IF a man seised in jure uxoris leases for years, rendering rent, and the feme dies without issue, by which he is not tenant by the curtesy, yet he shall avow for the rent till the heir has entered; per opinionem. Br. Avowry, pl. 123. cites 9 H. 6. 43.

2. If rent is reserved upon equality of partition, and the parcener grants it over, the grantee may distrain and make avowry for the rent as well as the parcener himself; for it is a rent-charge of common right. Br. Avowry, pl. 133. cites 21 H. 6. 10. [ 383 ]

3. If the tenant of the king dies seised, his heir may distrain and make avowry, and take the profits till office be found; quod non negatur. Br. Avowry, pl. 141. cites 3 H. 7. 3.

4. In trespass the defendant justified for damage feasant; the defendant said, that the plaintiff had nothing in the land, unless by sufferance of J. S. and the opinion of Keble was, that he may justify for damage feasant, but Vavisor contra. Br. Avowry, pl. 86. cites 4 H. 7. 3.

5. If a chapel and manor is united to the college, there ought to be attornment before the college can make avowry for the services due to the manor. Br. Avowry, pl. 150. cites 11 H. 7. 8.

6. *Cestui que vie* cannot make avowry for damage feasant, but in name of the feoffees. Br. Avowry, pl. 63. cites 15 H. 7. 3.

7. But where the King has the profits of any land by reason of outlawry in action personal, he may justify for action personal, and have trespass; for he has interest in the land; quod nota. Ibid.

8. In avowry by the heir in tail the case was, that tenant in tail of a feignory had purchased land, and made feoffment with warranty of the land, and had issue, and died, and assets descended, and the issue distrained and made avowry, and well per Brian and Keeble; for the feignory was only suspended by the unity of possession, and the discontinuance and the warranty did not go but to the land. Br. Garrancies, pl. 82. cites 16 H. 7. 40.

(M) Upon

(M) *Upon whom, and for what Thing it may be made.*

Br. Avowry, [1. **I** F the *tenant infeoffs another*, the lord ought to *avow upon* pl. 30. cites *the feoffor for the arrearages before* the feoffment, and not S. C. but *upon the feoffee.* 47 Ed. 3. 4. b.] S. P. does not clearly appear.

—Fitzh. Avowry, pl. 82. cites S. C. and S. P. accordingly. —So for suit due before the feoffment; per Moyle; for the feoffee may *tender amends*; for the suit cannot be made after the Court ended. Br. Avowry, pl. 96. cites 7 E. 4. 27.

*But after seffment, and no notice made, the lord may distrain for homage, and avow upon the feoffor for the homage*; but upon the matter of the feoffment shewn, the lord shall not have homage of him, nor the lord shall not render damages, and he shall not have fealty, nor other corporal service of the feoffor; for he cannot swear to do the services for the land which he has not; but the *avowry for the rent arrear is good upon the feoffor without notice.* Ibid.

Br. Avowry, pl. 30. [2. **[So]** If the *tenant infeoffs another without notice*, the lord may avow upon the feoffor *for the arrearages after* the feoffment & S. P. ac- *till notice.* Dubitatur 47 Ed. 3. 4. b.] cordingly.

But after notice he shall avow upon the feoffee, if he tenders the arrearages, but not otherwise. — Fitzh. Avowry, pl. 82. cites S. C. & S. P. accordingly.

\* Br. Avowry, pl. 7. [3. I may avow upon the *disseisor of my tenant.* \* 3 H. 6. cites S. C. 11. 20 H. 6. 9. b.] but S. P. does not appear.

[ 384 ] 4. The lord shall distrain and avow, because the tenant holds of him *to find him a house, and to find his court*, and did not do it, and a good avowry and tenure, and was not put to the quod permittat. Quod nota bene. Br. Tenures, pl. 83. cites Fitzh. Avowry 167. Tempore E. 1.

5. Avowry was made *for amercement in a leet.* Br. Avowry, pl. 12. cites 41 E. 3. 26.

6. For some things the avowry shall be *upon the discontinuance, as for relief for the alienation*; for this is chiefly upon the alienance, and the alienor shall not pay it; per Persey. Br. Avowry, pl. 31. cites 48 E. 3. 8.

7. If lord and tenant are, and the *rent is arrear*, and the *tenant makes feoffment*, and the *feoffee leases to the feoffor for years or for life*, and the *feoffee gives notice*, and after the *beasts of the feoffor come upon the land by escape*, the lord may *distrain them for the arrears due before the feoffment*, notwithstanding the notice by some, quære. Br. Avowry, pl. 127. cites 48 E. 3. 34.

8. Avowry was made *by lessor upon tenant for life, for rent reserved upon the lease as upon his very tenant.* Hank. said the avowry shall not be upon him but as upon his very tenant *by the manner*; for it shall not be upon him as upon his *very tenant*, but where he is *tenant in fee simple or fee tail.* But it seems that where the *remainder in fee is over*, that it is otherwise. Br. Avowry, pl. 36. cites 2 H. 4. 24.

9. Avowry *for relief after the death of an abbat* was awarded good;

good; for it was by prescription. Quære by common law; for there is succession, and no descent. Br. Avowry, pl. 128. cites 3 H. 4. 2.

(N) *In the Name of whom [or by what Name] it shall be made.*

[1. IF a baron be seised of a seignory in the right of his feme, the consuance ought not to be made for rent as bailiff to the baron only, but as bailiff to both. 12 R. 2. Avowry 88. Contra 13 H. 4. Avowry 198.]

[2. If there be lessee for years rendring rent, and the reversion descends upon a feme covert, and after the rent is arrear, and the baron distrains, and the lessee brings a replevin, the baron ought to avow in the name of himself and his wife, and not in the name of himself only; for the avowry is to be made according to the reversion, which is in the feme. Mich. 15 Jac. B. R. between Wife and Bennet, per Curiam; but they adjudged this good, because that he said that he distrained for rent due in the right of the feme (but \* quære how this could make it good).]

Cro. J. 442. pl. 17. Wife v. Bellent, S. C. adjudged accordingly, because he shewed the truth of the matter as it is, and did aver the life of the

feme, and so the distress well taken, and the rent due unto him.

\* This quære of Roll being cited, Twisden J. said, that it may be Roll's opinion was so when he was a student; that his private opinion must not warrant or controul us here; and that it had been adjudged that the husband alone may avow in right of his wife. Mod. 273. pl. 25. Trin. 29 Car. 2. B. R.

[3. In an assise of sovernt distress against the baron, who is seised of a seignory in the right of his feme, the baron may justify the taking of the distress for fealty and suit of court in his own name, tho' he hath had no issue by his feme. 27 Aff. 51. The same law for rent.]

Br. Avowry, pl. 85. cites S. C. and that in [ 385 ]

baron may distrain and avow in his own name for all the services unless for homage. Affize, 274. (273.) cites S. C. but S. P. does not fully appear. Fitzh. Affize, pl. 257. cites S. C. and S. P. seems admitted.

such case the

[4. But he can not justify the distress for homage before issue had. 27 Aff. 51.]

Br. Avowry, pl. 85. cites S. C. & S. P. ad-

mitted. — Br. Affize, pl. 274. (273) cites S. C. and S. P. seems admitted. — Fitzh. Avowry, pl. 257. cites S. C. & S. P. admitted.

[5. If by the custom of a court-baron the homage of the Court hath used, time out of mind &c. to elect a supervisor of the common belonging to the tenants of the manor &c. and a supervisor is elected, who takes the cattle of one of the tenants, and impounds them by the same custom, because he hath surcharged it; in replevin against him he cannot avow the taking as supervisor in his own name upon this matter, because he does not claim any interest, but only as supervisor. Mich. 15 Jac. B. R. between Stevens and Keblethwaite, adjudged upon a demurrer, which intratur Hill. 14 Jac. Rot. 206.]

Cro. J. 436. pl. 6. Stephens v. Keblethwait, S. C. and it was moved that it ought to be in the name of him that hath the freehold, and of some com-

commoner, but not in his own right, and that so ought the common pounder; but peradventure that cannot be any good cause of justification to make an avowry to have return, wherefore it was adjudged accordingly.

Fol. 319.

[6. An avowry is not good in the right of one executor, where there is another executor not named. 12 R. 2. Avowry 88.]

7. Lord and tenant by chivalry, the tenant leased for life and died, the heir within age, the lord seized the ward, the lord may distrain and make avowry in his own name for the rent reserved upon the lease. Br. Avowry, pl. 137. cites 11 Aff. 6.

(O) In what Cases it is to be made upon some Person in certain. And in what not.

Br. Avowry, pl. 46. cites S. C. and S. P. — [1. If an avowry be for homage, rent, or other service, it ought to be made to some person in certain. 14 H. 4. 3.]

Fitzh. Avowry, pl. 60. cites S. C. and S. P.

[2. If an avowry be made for relief, it ought to be made upon the heir of him upon whose death the relief is claimed. 34 Ed. 1. Avowry 233. Adjudged.]

Br. Avowry, pl. 46. cites S. C. & S. P. — [3. But if an avowry be for a fine for alienation upon a custom that every tenant ought to pay a fine for every alienation, this shall not be made upon any person in certain, but upon the custom. 14 H. 4. 3.]

Fitzh. Avowry, pl. 60. cites S. C. & S. P.

Br. Avowry, pl. 46. cites S. C. & S. P. — [4. So if an avowry be for a rent-charge, it shall not be upon any person. 14 H. 4. 3.]

accordingly. — Fitzh. Avowry, pl. 60. cites S. C.

Though the purview of this act is [ 386 ] general, yet all necessary incidents are intended, and therefore the avowant must allege seisin by the hands of somebody. 9 Rep. 36. a. in Bucknall's Case, by the reporter, and cites 27 H. 8. 4. b. accordingly; but says, that the ancient form of alleging seisin shall not be altered, and therefore the avowry shall be made generally since the statute of 32 H. 8. cap. 2. as it was used to be before; but the plaintiff in bar of the avowry may plead, ne unques seise within 40 years &c. and with this accords 1 Mar. Br. [Avowry], pl. 107. and D. 15 Eliz. 34. [31 s. b. pl. 101]. And if the lord by the 21 H. 8. alleges seisin in his avowry, and avows the distress as within his fee and feignory, and not upon any person certain, in such avowry, every plaintiff in the replevin, be he tenant or otherwise, may have every answer to the avowry which is sufficient, and likewise shall have aid, and all other advantages in the law; and it is no exception now, that he is a stranger to the avowry, for being made on no certain person, either nobody or every body is a stranger, and with this accords 34 H. 8. tit. Avowry. Br. 113. 27 H. 8. 4. b. and 20. b. —

Upon this statute these 4 points are to be observed; 1st. That the lord has still election, either to avow according to the common law, or by force of the statute, by reason of the word (may). 2dly, albeit the purview of the act be general, yet all necessary incidents are to be supplied, and the scope and end of the act to be taken; and therefore, though he need not make his avowry upon any person certain, yet he must allege seisin by the hands of some tenant in certain within 40 years. 3dly, If the avowry be made according to the statute, every plaintiff in the replevin, or 2d deliverance, be he tenant



termor or other, may have every answer to the avowry that is sufficient, and also have aid, and every other advantage in law (disclaimer only except), for disclaim he cannot, because in that case the avowry is made upon no certain person. Athly, Where the words of the statute be (If the lord distrain upon the lands and tenements holden) yet if the lord comes to distrain, and the tenant chafes his beasts, which were within the view, out of the land holden, and there the lord distrains, albeit the distress be taken out of his fee and seignory in that case, yet it is within the said statute; for in judgment of law the distress is lawful, and as taken within his fee and seignory, and this statute being made to suppress fraud, is to be taken by equity. Co. Litt. 265. b.

(P) Justification. [*In what Cases. And in what Cases Avowry. And by whom. And what shall be recovered.*]

[1.] IF the avowant ought to have the thing for which he took the distress, though his estate be determined after or before the distress, yet he may avow, because if he justifies, he shall not have a return, and so shall not have the thing for which he distrains. 19 H. 6. 41. Curia.]  
 accordingly.—Fitzh. Avowry, pl. 10. cites S. C. and S. P. accordingly.—S. C. cited Arg. Mar. 104. in pl. 178. Trin. 17 Car. in Case of LAWSON v. COOKE, which case was, *grantee of a rent-charge* in fee distrains for arrears, and then *grants the same over*, Quære if he may avow? On the one side it was argued, that the avowry depends on the inheritance which is gone by the grant, and that he ought to have justified to excuse himself of damages, and took a difference between the act of God and of the party, as where *cestuy que vie* &c. dies, the arrears are not lost, but otherwise in the case of a grant, as here. But it was said on the other side, that where there is a duty at the time of the distress he shall avow, and not justify, and at least it turns the avowry into a justification in this case, so as you shall not make trespassors of us, but that we may well justify to save our damages, and cited 22 E. 4. 36. The Court all agreed, that at least the avowry is turned into a justification; *sed adjournatur*. Mar. 103. pl. 178. Trin. 17 Car. Lawson v. Cooke—Note, that it was said, that if any one *distrains for a rent*, and *before the avowry the estate upon which it is reserved determines*, the avowry shall be as if the estate had continued; for the avowant is to have the rent notwithstanding. But if the distress were for a *personal service*, then the defendant must have a special justification; for he cannot have that service in specie when the estate is determined. Vent. 250. Mich. 25 Car. 2: B. R. in Case of Wildman v. Norton.

Br. Justification, pl. 6. cites S. C. —Br. Avowry, pl. 53. cites S. C. & S. P.

[2.] As if a man takes a distress for rent reserved upon a lease for years, and after accepts a surrender of the land, yet he may avow, because he is to have the rent, notwithstanding the surrender. 19 H. 6. 41. Curia.]

So if it be upon a lease for life, or if the term for years expires.

Br. Justification, pl. 6. cites S. C. per tot. Cur. except Ascue.—Br. Avowry, pl. 53. cites S. C. and S. P. accordingly.—Fitzh. Avowry, pl. 10. cites S. C. and held accordingly, per tot. Cur.

[3.] So if the rent be reserved upon a lease per auter vie, and after the rent incurred, *cestuy que vie* dies, he in the reversion may avow, though the estate be determined, because he is to have the rent. 19 H. 6. 41.]

[387] Br. Justification, pl. 6. cites S. C. per tot. Cur. except Ascue.

—Br. Avowry, pl. 53. cites S. C. & S. P. accordingly.—Fitzh. Avowry, pl. 10. cites S. C.

[4.] But if the distress was lawful, but by a matter *ex post facto* he is not to have the thing for which the distress was made, there he shall not avow, but may justify. 19 H. 6. 41.]

Br. Avowry, pl. 53. cites S. C. & S. P. accordingly.

Br. Justification, pl. 6. cites S. C. & S. P.—Fitzh. Avowry, pl. 10. cites S. C. & S. P. accordingly.

[5.] As

Br. Justification, pl. 6. cites S. C. per tot. Cur. except Af. cue.—

[5. *As if the lord distrains for homage, and after he, that ought to do homage, dies, and his executor sues a replevin, the lord ought to justify, because the homage is gone by his death.* 19 H. 6. 41.]

Br. Avowry, pl. 53. cites S. C. & S. P.—Fitzh. Avowry, pl. 10. cites S. C. & S. P.

[6. *But if the lord distrains for homage, and after the tenant infeoffs a stranger of the land, yet the lord may avow, and shall not justify; for he shall recover his homage against him.* 41 Ed. 3. Avowry 79.]

Br. Avowry, pl. 96. cites S. C. & S. P. accordingly, by Moyle.—Fitzh. Avowry, pl. 36. cites S. C. & S. P.

[7. *If the tenant makes a feoffment, and after, before notice, the lord distrains for homage, yet he shall not avow upon the first tenant, but shall justify, for he shall not recover the homage against him, because he was not his tenant de facto at the time.* 41 Ed. 3. Avowry 79. 2 R. 2. Avowry 85. 7 Ed. 4. 28.]

Br. Avowry, pl. 96. cites S. C. & S. P. per Moyle.—

[8. *But in this case, if the lord avows for homage before he hath notice of the feoffment, yet this will excuse him of damages, but he shall not have a return.* 7 Ed. 4. 29.]

Fitzh. Avowry, pl. 36. cites S. C. & S. P. accordingly, by Pigot.

Br. Avowry, pl. 96. cites S. C. & S. P. accordingly, per Moyle.—

[9. *If suit of court be arrear, and after the tenant aliens in fee, yet the lord may avow for the suit, to have amends for it.* 7 Ed. 4. 28. per Moyle.]

Fitzh. Avowry, pl. 36. cites S. C. but I do not observe S. P. there.

Fol. 320.

See (N) pl. 5. S. C. and the note there.

Note the defence, viz. defendit vim & injuriam quando &c. & quicquid est in contemptum domini

Regie, & ejus mandatum. F. N. B. 72. (B) in the new notes there (b) cites 38 E. 3. 31.

[ 388 ]

Br. Trespass, pl. 174. cites S. C. & S. P.—

[12. *A commoner may justify the taking of cattle of a stranger upon the common, damage feasant.* 15 H. 7. 13. b.]

Br. Commoner, pl. 40. cites S. C. & S. P.—Br. Avowry, pl. 86. cites 4 H. 7. 3. that it was agreed by the justices, that if a man has common in certain land he cannot take the beasts of a stranger damage feasant.

[13. *[And]* A commoner may avow the taking of the cattle of a stranger upon the common damage feasant, though he can have no action of trespass. 15 H. 7. 13. b. Brooke, Common 35. cites 24 Ed. 3. 42. (*Quære where this is.*)]

—Br. Common, pl. 36. (35.) cites also 5 H. 7. 2. —Ibid. pl. 40. (39.) cites 15 H. 7. 13. —Br. Avowry, pl. 63. cites S. P. as agreed 15 H. 7. 12. by Frowicke Ch. J. and all the justices, and cites 24 E. 3. 42. accordingly.

In avowry for damage feasant the plaintiff claimed common appendant; the defendant alleged unity of possession in the one land, and the other, after time of memory, and a good plea per Cur. Br. Avowry, pl. 65. cites 24 E. 3. 25. 35.

[14. *But one tenant in common cannot avow the taking of the cattle of a stranger upon the land damage feasant, without making himself bailiff or servant to his companion.* Pasch. 8 Car. B. R. between *Lamshead*, plaintiff, and *Leate and Rowel*, defendants, adjudged upon demurrer, I myself being of counsel with the defendant. Intratur Tr. 7 Car. Rot. 810.]

because it was not in the realty as for rent, in which case an avowry may be in the name of one tenant in common alone & separatim, but this is only in the personalty for damage feasant, and damages only to be recovered, and return of the distress, and the other tenant has interest in it as well as the avowant, and so the avowry ought to be in his name, and to make cognizance as bailiff to the other tenant in common, and of this opinion was all the Court, absente Richardson, and judgment nisi &c. —But where defendant made consuance for damage feasant, as bailiff to A. who was devisee of capite land, and so tenant in common with the heir of the devisor, Walmsley J. held that the consuance ought to be in both the names, for the damages are to both, but Anderson and Beaumont contra; for a tenant in common may solely defend, and he only may take a distress, and although his avowry is by way of action, yet he may justify it; but because he shewed not in the consuance what estate the devisor had at the time of the devise, but only that he was seised of the land, it was held to be ill, and therefore adjudged for the plaintiff. Cro. E. 530. pl. 60. Mich. 38 & 39 Eliz. C. B. Willis v. Fletcher.

15. In replevin against 2, the one avowed for himself, and justified for his companion, and the plaintiff prayed process against the other who did not appear, and the Court denied it; for he is out of Court, by reason that the other has justified for him; quod nota per Cur. Br. Avowry, pl. 33. cites 49 E. 3. 24.

16. In avowry the plaintiff may disclaim; but if the defendant makes justification, and not avowry, there the plaintiff cannot disclaim. Br. Justification, pl. 10. cites 9 E. 4. 28.

17. In replevin the plaintiff counted that the defendant, such a day &c. took his horse in Cambridge, in a place called the Market-place, &c. The defendant avowed, because W. C. was seised of three acres in fee, and held them of J. B. grandfather of the defendant, by homage, fealty and escuage, and a hawk by the year, &c. and conveyed the seignior to the defendant, and that the plaintiff has the estate of the said W. C. in half an acre, parcel of the three acres, and that the hawk was arrear after the death of the grandfather by 20 years, by which he distrained for the 20 hawks, and as he was chasing the horse to the pound he escaped into the market-place, which is the same taking of which the action is brought, and avowed upon the plaintiff as upon his very tenant, and a good avowry by all the justices, and shall not be put to a justification; for they were always in his possession after the first taking, notwithstanding the escape, and it is good for all the 20 hawks; for every parcel of the three acres is charged

charged with the whole service. And per Catesby J. the tenant shall be now charged of one hawk for the half acre, for a hawk cannot be severed, and therefore every parcel shall be charged of the whole. Quod non negatur. Br. Avowry, pl. 110. cites 22 E. 4. 36.

This in Roll is (R); but as there is no (Q) it is made so here.

(Q) Upon what *Plea*. [And though he shall not have return.]

[1. **I**N replevin against *A. and B.* if *A.* pleads *non cepit*, yet *B.* may make *consuance in the right of A. and avow for himself*; for *B.* shall not by the plea of *A.* be ousted of his advantages. 14 Ed. 3. Avowry 118.]

[2. *[So]* In a replevin against *A. and B.* if *A.* pleads *non cepit*, yet *B.* may make *consuance in the right of A. and C.* for *B.* shall not be ousted of his advantages by the plea of *A.* 14 Ed. 3. Avowry 118. adjudged.]

[3. *[So]* In a replevin against the lord and his bailiff, if the lord pleads *non cepit*, the bailiff may avow for rent in the right of the lord, though he shall not have a return. 17 Ed. 3. 72. b. adjudged. 15 Ed. 3. Avowry 107. adjudged. D. 8 Eliz. 246. 70. admitted for damage tenant. 18 Ed. 3. 53. adjudged. contra 14 Ed. 3. Avowry 118.]

\* In replevin against a, the one pleaded that

ne prift pas, and the other justified in right of him who pleaded ne prift pas, and it was held clearly that if the justification be found for him, yet he shall not have return, because he in whose right, &c. pleaded ne prift, &c. Br. Replevin, pl. 20. cites 22 H. 6. 52. — Fitzh. Replevin, pl. 8. cites S. C. & S. P. accordingly.

[4. But in this case he may justify without doubt. 17 Ed. 3. 72. b. 18 Ed. 3. 53. b. \* 22 H. 6. 52. b. 53.]

[5. In a replevin, if the defendant says that he took it in another place, and that this is ancient demesne, he may avow the taking there, although he shall not have a return if it be found for him, because the Court hath no jurisdiction. 21 Ed. 3. 7. 51. Contra 21 Ed. 3. 51.]

## (R) Pleadings in Avowry.

\* It is (car) for (for) in all the editions; but it seems misprinted for (quere.)

In replevin, the defendant pleaded that the taking was

1. **I**N replevin the defendant made *consuance as bailiff of the lord for services arrear*. The plaintiff said that before the taking, the lord leased the seignory to *J. N.* for 3 years, which yet continues; judgment, &c. and a good plea. \* Quere if he ought not to say, before those services due &c. and also that he attorned to the lessee. Br. Avowry, pl. 66. cites 24 E. 3. 45.

2. In replevin the defendant pleaded to the writ, and to have return made avowry, and so it appears often elsewhere, and that the issue shall come upon the plea to the writ. Br. Avowry, pl. 119. cites 11 H. 6. 31.

*in another place, and traversed the place where, &c.* per Cur. this is not enough, for he must go on and make an avowry to have a return, though such avowry is only a suggestion to bring him within the statute of H. 8. for damages. 1 Salk. 94. pl. 4. Hill. 8 W. 3. Anon. [ 390 ]

3. In avowry, *because A. was seised and granted to him a rent-charge, or leased and avowed for rent reserved, it is a good plea that at the time of the lease or grant the lessor or grantor had nothing in the land*; quod nota; per Rede Ch. J. Br. Avowry, pl. 82. cites 21 H. 7. 25.

## (S) Pleadings in Avowry for Damage feasant.

1. **I**N avowry for damage feasant, if amends be offered upon the taking or after the return awarded, the sufficiency of it shall be tried per pais, and this seems to be in action of detinue after return awarded, and in the same avowry where the tender was offered upon the taking of the beasts; and so see that he who has return has not gained property, but only a pledge. Br. Avowry, pl. 46. cites 14 H. 4. 2.

2. In replevin, the defendant said, *that the place at the time, &c. was the franktenement of J. N. who leased to him at will, and be distrained for damage feasant, and the plaintiff said, that it was his franktenement, and not the franktenement of J. N. and the defendant had aid after issue joined, and not before. And so see his franktenement pleaded in avowry &c.* Br. Avowry, pl. 117. cites 10 H. 6. 26.

3. In replevin, the defendant said, *that he was seised of a close called B. unde locus in quo, &c. in his demesne as of fee, and took the beasts damage feasant, and this awarded good, notwithstanding that he did not pursue the ancient form, viz. that the place is his franktenement, &c.* for Moyle said, this is the best form; for franktenement rests in three sorts, and therefore more uncertain. Br. Avowry, pl. 72. cites 9 E. 4. 28.

4. In replevin by A. the defendant said, *that the place where, &c. is, and time out of mind was, 4 acres of land which were his franktenement, and he found the beasts there damage feasant, and took them, and admitted for a good avowry as well as if he had said that he was seised in fee, and distrained for damage feasant.* Br. Avowry, pl. 105. cites 21 E. 4. 5. And the same agreed in the Case of WIMBISH in the time of H. 8. well argued, and 21 H. 7. 12. and M. 4 E. 6. Quod nota.

S. P. Br. Avowry, pl. 80. cites 21 H. 7. 12.—S. P. Br. Avowry, pl. 122. cites 4 E. 6.

5. In avowry, the plaintiff said, *that the land adjoined to the high-way, and was open for want of inclosure of the tenant, and that he chased his beasts in the high-way, and they escaped in, and the defendant took them, and the plaintiff freshly pursued, and did not allege prescription that the tenant ought to make the hedge, and yet well. The defendant said that they were there by two nights, and no plea without traversing the escape or the fresh suit; for the one of them ought to be traversed.* Br. Avowry, pl. 135. cites 15 H. 7. 17.

3 Salk. 94.  
pi. 1. S. C.  
adjudged ac-  
cordingly.

6. Avowry for damage feasant *in his common*, but *alleged no damage to himself*, this is nought; because he cannot distrain a stranger's cattle without alleging a particular damage to himself.  
3 Lev. 104. Pasch. 35 Car. 2. C. B. Woolton v. Salter.

## [ 391 ] (T) Pleadings in Avowry for Homage, Fealty, Rent, Suit of Court, and other Casual Services.

S. C. & S. P.  
cited Arg.  
Saund. 286.  
286. ———  
But see tit.  
Replevin  
(M) pl. 6. and the notes there.

1. IF an avowry be made for rent, and it appears by the party's own shewing *that part of it is not yet due*, yet the avowry is good for the residue, and shall not abate in toto. 11 Rep. 45. b. in a nota by the reporter in Godfrey's Case.

2. Avowry for an intire rent reserved on a lease of lands, part in possession, and part in *reversion*. See D. 256. b. 257. a. pl. 11. Mich. 8 & 9 Eliz. Anon.

3. A. seised in fee *granted a rent-charge to B. and afterwards aliened the lands to J. S.*—B. in replevin *avowed* for the rent. The *alience replied, that nothing passed* by the grant. It was held per tot. Cur. to be no plea, nor can any issue be joined upon it; but he should have said, that *ne granta pas* by the deed; for the rent was not then in being, because it was created by the grant, and it cannot properly be said, that nothing passed by the deed, the thing not being then in esse. 2 Le. 13. pl. 21. 19 Eliz. C. B. Steward's Case.

4. Exception was taken to a *conuſance* for rent, because the *clause of entry and distress in the deed*, upon oyer of it, *differs from the clause of entry and distress alleged in the conuſance*; for in the conuſance it is said, it should be *lawful to enter and distrain if the rent were unpaid and behind after any of the feasts whereon it was due*, that is, at any feast that should first happen after the death of C. and D. for the rent did not commence before. But by the deed, if the rent were behind *at any of the feasts*, the entry and distress is made to be lawful for it *during the joint lives of C. and D.* and during their joint lives it could not be behind, for it commenced not till one of them were dead; so as the sense must run, that *if the rent were behind, it should be lawful to distrain during the joint lives of C. and D.* which was before it could be behind; for it could not be behind till the death of one of them; therefore those words (*during their joint natural lives*) being *insensible ought to be rejected*; for words of known signification, but so placed in the context of the deed, that they make it repugnant and senseless, are to be rejected equally with words of no known signification. Vaugh. 173. Hill. 23 & 24 Car. 2. C. B. Crowley v. Swindles.

5. An avowry was *for a relief upon the tenure for fealty, rent, and suit of court*, and good *without mention of the relief*, because it is not parcel of the tenure, but a flower incident to every tenure in *forfeiture*,  
cage,

cage, yet one need not plead it specially, and set forth a *title to it*; for though perhaps it might have been *released*, or there might have been a *special reservation without relief*, this shall not be *intended* unless shewn of the other side, because it is incident of *common right*; per Cur. 3 Lev. 145. Mich. 35 Car. 2. C. B. Freeman v Booth.

6. To an avowry for rent the plaintiff cannot plead *de son tort clemesne and traverse that any thing was in arrear*, but ought to plead *riens arrear*. Ld. Raym. Rep. 641. Hill. 12 W. 3. Horn v. Lewin.

See Traverse (X. 2) pl. 6. and the notes there.

## (U) Pleadings. Avowry. In what Cases there must be an Averment.

1. IN avowry for rent granted by tenant in tail, the defendant ought to aver the life of the tenant in tail. Br. Avowry, pl. 134. cites 15 E. 4. 8.

Jointenants in fee of a manor intermarried, and levied

a fine thereof to a stranger, who rendered it back again to them in tail; they had issue three daughters, the husband died, and the widow married a second husband, and he and his wife levied a fine, and took back the manor in *special tail*; then the second husband made a lease for years of the manor, and the lessee distrained a copyholder for rent, who brought a replevin, and the defendant avowed the taking, but did not aver the life of the lessor, and for that reason it was held ill. Cro. Eliz. 524. Mich. 38 & 39 Eliz. B. R. Laughter v. Humphries.

2. Replevin of taking in D. the defendant avowed, because the plaintiff held of the defendant by homage 10 s. rent, and to find a man one day to reap his corn, when he shall be required, and for the rent arrear and the not finding of the man upon request, he avowed; and note that he ought to say that such a day before harvest he requested him, and the plaintiff did not come, and for suit of court that such a day before the court he was summoned to come to the court, and did not come. Br. Avowry, pl. 89. cites 9 H. 7. 22.

3. The executor of a grantee of a rent or reversion expectant upon an estate for life may not avow his distress without an averment, that the arrearages incurred after the death of the tenant for life, adjudged. Heath's Max. 37.

## (W) Where there must be a Profert or Monstrans of Deeds.

1. IN avowry, the defendant shewed that the services of one tenant were granted to J. N. by fine in tail, the remainder to him, and that the tenant in tail was seised of the services, and died without issue, and after he was seised of fealty, and for the services arrear he avowed; Belk. said he did not shew any thing of the remainder, nor possession of the services, except the fealty, where he ought to shew it of the remainder, as in formedon; but per Thorp, he has shewed seisin of the fealty, which is seisin of all the services; by which they were at issue upon another matter; and so Brooke

Br. Seisin, pl. 4. cites S. C.—Br. Monstrans, pl. 18. cites S. C.—So where he in remainder made avowry for the rent without shewing

anything of the rever-  
 sion, the  
 avowry was  
 awarded  
 good, quod nota; notwithstanding that he ought to shew deed in *formedon* in remainder.  
 Br. Monstrans, pl. 22. cites 45 E. 3. 23.

2. In *avowry* the defendant shewed how he recovered damages, and had the land in execution by *elegit*, and so possessed demised to the plaintiff for years rendring 10 l. rent, and for so much arrear he avowed, and the plaintiff prayed that he might shew the record; and the best opinion was that he need not shew it, for the effect is the lease, and to this the plaintiff shall answer, and not to the record, and therefore it is in vain to make him shew it; and the other shall answer to the lease, but he need not shew the record. Br. Monstrans, pl. 10. cites 34 H. 6. 48.

[ 393 ] So of bailiff of the king without deed, and is not traversable if he be bailiff or not, if he for whom he distrains agrees to it, quod nota. Ibid.

4. If a man in an *avowry* conveys a good estate to 2, and one releases to the other, it is not good without shewing of a deed in that case. Winch. 72. Wharton v. Hide.

8. C. cited  
 by Hobart  
 Ch. J. Hob.  
 301.

5. In *replevin* the defendant avowed for rent granted 12 E. 2. but did not shew the deed, upon which it was demurred, and held that the not pleading the deed of rent here shewn in court, or hic in curia profert, is matter of substance, and not aided by the 27 Eliz. Mo. 885. pl. 1243. Trin. 13 Jac. Heard v. Baskerville.

6. In second deliverance, the defendants made *conusance* as bailiffs to the master and governors of *Christ's Hospital*, &c. for that they are a corporation, and seised in fee of the place where, in the right of the hospital; upon demurrer it was objected that the *conusance* was ill, because it did not set forth how incorporated, nor say *per eorum preceptum*, nor shew any writing; but adjudged that this *avowry* is good, because the incorporation is but an inducement to the alleging the seisin in them, therefore need not be shewn, nor need he allege any precept in writing. 3 Lev. 107. Mich. 34 Car. 2. C. B. Manby v. Long.

## (W) Pleadings. The Form of an Avowry at Common Law.

1. **MOWBRAY** avowed the taking goods &c. in the place, &c. because he had a house and a carve of land in W. to which he has common appendant in the place, &c. and because he found the beasts of the plaintiff there, which were levant and couchant in P. which will does not inter-common there, nor chase nor re-chase, but



but were feeding and trampling his common; he avowed, &c. for damage feasant in his common, and it was not denied but that the avowry is good. Br. Avowry, pl. 64. cites 24 E. 3. 42.

2. Where there are 2 distresses, and the one avows for rent due to him, and the other for rent due to him, there both avowries shall abate, because both cannot have return. Br. Retorne de Avers, pl. 1. cites 2 H. 6. 1.

3. In avowry the defendant alleged seisin by the hands of J. N. *que estate the plaintiff has in the tenancy*, and well per judicium: Br. Avowry, pl. 7. cites 3 H. 6. 11.

But he can not allege seisin by such a one in the seignory,

*que estate he has in the seignory*; for this is his title, and the tenancy is the title of the plaintiff by 34 H. 8. Note the diversity. Ibid.

4. In recordari the defendant avowed, *because the King is seised of the castle of C. in right of his duchy of Cornwall, to which he has 20 s. rent out of the vill of D. to be paid yearly at Michaelmas, of which rent the King and all the Dukes of Cornwall have been seised time out of mind, by the hands of the residents and residents of the same vill, and that they have used to distrain for the arrears of it time out of mind, by which for the rent arrear, &c.* The defendant as bailiff of the King confessed the taking, &c. and prayed aid of the King, and there it was agreed that in avowry, consufance, &c. seisin shall be alleged by the hands of some person certain, but as here because it was by the hands of the inhabitants, and the seisin by the hands of the one is seisin of all, and commonalty cannot be named, therefore by advice of all the Court the consufance was awarded good, and the aid granted. Br. Avowry, pl. 71. cites 4 H. 6. 29.

S. C. cited 6 Rep. 59. a. (f) in Brediman's Case. [ 394 ]

5. Where the lord avows upon the heir, he need not to shew if the rent was arrear in the time of the ancestor or in the time of the heir; for the lord may avow and charge the land, though it was in the time of the ancestor. Br. Avowry, pl. 15. cites 34 H. 6. 46.

6. *Contra* for rent arrear in the time of the predecessor of the lord. Ibid.

7. If a man distrains 20 beasts, and the plaintiff sues replevin but of 10, yet the defendant shall make avowry for 20, otherwise he cannot have return of all; nota per Prisot. Br. Avowry, pl. 16. cites 35 H. 6. 40.

8. In replevin by one, the lord by grant for years avowed upon the plaintiff and another for certain services, as upon his tenant by the manner, and admitted, and well, as it seems. Br. Avowry, pl. 98. cites 12 E. 4. 2.

9. A man may avow, inasmuch as the plaintiff held of him 20 acres of land, whereof, &c. by homage, fealty, and escuage, &c. and allege seisin of the service, &c. and well, notwithstanding that he did not say that he held of him as of his manor, &c. Br. Tenures, pl. 41. cites 19 E. 4. 9. per Cur.

10. The defendant avowed for that he was seised of the place where, and so justified the taking damage feasant; and upon demurrer this avowry was held ill by all the Court; for he ought to

Carth. 9. S. C. adjudged.

have set forth of what estate he was seised; and Powell J. said it would have been ill on a general demurrer. 2 Lutw. 1231. Trin. 8 W. 3. Saunders v. Hussey.

### (X) Surplusage in Avowry.

One avowry for rent-service and rent-charge is not good, because one may be due and not the other; but

1. IF the lord distrains a horse for rent-service and rent-charge out of one and the same land, and the tenant pleads nothing arrear, and it is found that the one rent is arrear, and the other not, the lord shall have return of the horse, and yet shall render damages for the other. Quod nota. Br. Avowry, pl. 6. cites 2 H. 6. 1. and 3 H. 6. 44.

he may avow for taking so many beasts for rent-service, and so many for rent-charge, and good; per Coke Ch. J. Roll Rep. 35. at the end, Pasch. 2 Jac.

If an avowry be made for rent, and it appears by the party's own shewing that part of it is not yet due, yet the avowry is good for the rest, and shall not abate wholly. 11 Rep. 45. b. in Godfrey's Case.—S. C. & S. P. cited Saund. 5.—But if one avows for 2 things, and it appears by his own shewing that he hath right but to one, the avowry shall abate for the whole. Roll Rep. 23. 34. Arg. But Coke Ch. J. held that if a man has brought action for 2 things, and it appears that he has no cause of action for part, nor ever can have, there the avowry shall not abate but for part only; but if he may have action of another nature for part, or may have remedy hereafter for part, there the whole shall abate; and that there is another diversity, viz. where the party confesses that he has no cause of action for part, there the whole shall abate; but where it is found by verdict, it shall not. Ibid. 77. in Case of Bullen v. Godfrey, S. C.

[ 395 ] In avowry for rent, after judgment for the avowant, error was brought, for that part of the rent became due after the distress taken, it being made 3 days before Michaelmas, and the defendant avowed for that Michaelmas rent. Per Cur. This is naught, because the judgment in replevin is to have a return irrepleviable, (i. e.) that he shall have the distress as a pledge till all the rent is paid, and that was more than was due at the time of the distress taken, and therefore the avowant ought to have abated his avowry quoad Michaelmas rent, and taken judgment for the rest. 2 Salk. 587. pl. 2. Mich. 9 W. 3. B. R. Richards v. Cornforth.—5 Mod. 363. S. C. and judgment reversed, nisi.—But the defendant getting his avowry amended in C. B. the roll was amended here in B. R. and so the error was cured. 2 Salk. 587.

Bullst. 125. S. C. and by Yelverton J. the rent by the marriage is now due, and arrear to them both; and the whole Court did clearly agree, and adjudged the avowry well made, and judgment in C. B. affirmed.

2. A. seised in fee, granted a rent-charge to M. his daughter. The rent being arrear, M. married P. and afterwards P. distrained and avowed for the rent so arrear, supposing in the avowry that the same was arrear, and not paid to the said P. and his wife. It was moved that it was ill, because it appears that it cannot be due to P. but only to M. dum sola fuit, but held to be only matter of form and surplusage, and though he does not say adhuc a retro existit, it is well enough in substance; and judgment affirmed. Cro. J. 282. pl. 3. Trin. 9 Jac. B. R. Bowles v. Poor.

Hob. 268. pl. 262. Brown v. Dunnery, S. C. adjudged accordingly.—Mo. 687.

3. A rent-charge was granted to R. and M. his wife for life. The rent being arrear, R. died, and the defendant made consuance as bailiff to M. as administratrix to R. for rent arrear in the life of R. and exception being taken thereto, because M. by the survivorship was entitled to the rent in her own right, and not as administratrix; and it was held to be superfluous, and judgment for

for the avowant. Brownl. 171. Hill. 15 Jac. Brown v. <sup>pl. 1248.</sup> Dunri. <sup>Dembyn</sup>

S. C. adjudged accordingly; but only there the word (debt) is put instead of the word (avowry.) <sup>v. Brown,</sup>

## (Y) The Form upon the Statutes of H. 8.

1. **A VOWRY** upon the new statute of 21 H. 8. *upon the land,* and upon no person *the avowant ought to allege seisin by the hands of some one,* notwithstanding that that he does not make avowry upon any person certain, and so he did, and the plaintiff alleged that a stranger was seised, &c. *without making privity from him by whom seisin was alleged,* that he leased to him for years, and prayed aid, and had it; quod nota. Br. Avowry, pl. 4. cites 27 H. 8. 4.

2. Avowry, because the land was held of him by fealty and rent, and alleged seisin &c. and for the rent arrear he avowed upon the land by the statute of 21 H. 8. *but he did not make mention of the statute;* quod nota; and so well, as it seems, because it is a general statute. Br. Avowry, pl. 5. cites 27 H. 8. 20.

3. He who avows upon the land, as within his fee or seignior, by the statute 21 H. 8. *shall allege seisin as in another avowry, and then shall conclude his avowry upon the land as within his fee and seignior;* and in such avowry every plaintiff in the replevin, *be he tenant or other, may have every one an answer to the avowry, as to traverse the seisin, the tenure, and the like, which are good answers in avowry, or plead release, or the like, as tenant of the franktenement shall do, though be a stranger to the avowry;* for such avowry is not made upon any person certain, therefore every one is a stranger to this avowry, and so the plaintiff may have any answer that is sufficient. Br. Avowry, pl. 113. cites 34 H. 8. [ 396 ]

4. It was agreed that at this day, by the limitation of 32 H. 8. *the avowry shall be made generally,* as was usually done before; and if he does not make seisin after this limitation, then the plaintiff in bar of the avowry may allege it, and traverse the seisin after the limitation. Quod nota. Br. Avowry, pl. 107. cites 1 M. 1.

5. In replevin the defendant made consufance that one L. was seised of the land in fee in which the distress was taken, and held the same of A. as of his manor of E. by fealty and other services, and for the rent arrear the defendant made cognizance as bailiff to the said A. It was objected that the cognizance was not good, because the defendant having alleged that L. held the lands, *be afterwards avows as on the statute,* which is not good; for when he meddles with the name, and so takes consufance of him, he ought to avow upon him by the common law, and not upon the land, by the statute; but the Court held that it was well enough, Cro. Eliz. 146. pl. 7. Mich. 31 & 32 Eliz. B. R. Lucy v. Fisher.

Le. 301. pl. 413. Lacy v. Fisher, S. C. and exception was, because the consufance seems made according to 21 H. 8. 19. and yet that statute is not pursued through

through the whole consuance; for by that statute in avowry or consuance, the party need not name any person certain as tenant of the land, &c. nor make avowry or consuance upon any person certain, and though here he has not made consuance on any person certain, yet he has named a person certain as tenant, &c. and so being made neither according to the common law or statute, it cannot be good; sed non allocatur; for if the statute remedies 2 things it remedies one, and the Court thought the consuance well enough.

6. A. having a reversion in fee after an estate for life, devised a rent of 4l. to B. for life. A. died, 7 years incurred, and B. died. B.'s executors avowed for the rent. On demurrer exception was taken, that it was not averred that the land remained in the seisin of the tenant who ought to pay it, or of some other who claims from him by purchase or descent, according to the stat. 32 H. 8. cap. 37. And Anderson and Walmsley held it material; but in shewing it generally according to the words of the statute is sufficient, without shewing how he was seised, he being a stranger. Cro. E. 547. pl. 20. Hill. 39 Eliz. C. B. Myles v. Willoughby.

### (Z) Where but one, and where several Avowries.

1. **I**T is said that in replevin against several, if some avow for themselves and for the others, those others cannot plead to the writ. Thel. Dig. 194. lib. 13. cap. 1. f. 10. cites 19 E. 3. 56.

2. Where two coparceners of land, held by suit of court, make partition, and the one aliens his part to one, and the other aliens his part to another, the lord may distrain which he pleases, and avow upon him only; for upon several tenants a man shall not make joint avowry, and if the one makes the suit it shall discharge the other, and he may plead it; per Skipwith, quod nemo negavit. Br. Avowry, pl. 69. cites 24 E. 3. 34.

3. A man may make avowry for two heriots after two descents in one and the same avowry, when it is by one and the same seignior. Br. Avowry, pl. 138. cites 27 Ass. 24.

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As where a man avows for rent of two terms, and one is found for the defendant, and the other against him, he shall have return.

Ibid.

So where he avows for rent and fealty, and it is found

4. In replevin, the defendant avowed, because there is a custom within his manor, that the tenants shall chuse a beadle to collect his rents and amerciaments, and that in case the beadle be not sufficient, that he shall distrain the tenants for non-sufficiency of the beadles, for the rent and amerciaments; and because such a beadle was not sufficient of the rent, and also for non-sufficiency of the amercement, he avowed the taking of an ox. Cand. as to the rent, said, there was no such custom, and as to the amercement he was sufficient, and exception was taken, because he took two issues, where it is of one ox, and there it was agreed, that if any of the issues pass for the defendant, he shall have return, and the plaintiff was compelled to answer to both issues; quod nota. Br. Avowry, pl. 25. cites 44 E. 3. 13.

as above; but where both are found for the plaintiff, he shall recover damages, and otherwise not. Ibid.

5. *Two distrain, and one avows for rent due to him, and the other avows for a thing due to him, both avowries shall abate; for both cannot have return.* Br. Avowry, pl. 6. cites it as agreed 3 H. 6. 44.

6. *Avowry, because the plaintiff held 20 acres of him by 20 s. per ann. and fealty, and for 10 s. of every year of 6 years being arrear, be avowed; and per Cur. you ought to confess you have been paid the rest, viz. 10s. for every year of the 6 years residue of the 20 s. per ann. quod nota.* Br. Avowry, pl. 102. cites 20 E. 4. 2.

7. *If a man makes joint avowries where there are several avowries, the avowry shall abate; quod nota bene.* Br. Avowry, pl. 145. cites 21 H. 7. 37.

8. *Lord and tenant by 3 d. if the tenant dies, and the feme is endowed of 1d. she may distrain and avow for the 1 d. and the heir for the 2 d. and so two distresses during the dower.* Br. Avowry, pl. 139. cites 24 H. 8.

9. *If two coparceners make partition, and give notice to the lord, he ought to make several avowries.* Br. Avowry, pl. 111. cites 29 H. 8.

10. *It was resolved by the justices, that an avowry may be for part of a rent.* 4 Le. 4. pl. 13, Pasch. 31 Eliz. C. B. Anon.

11. *One avowry may be made upon two several titles of land, though the avowry is but for one rent. 1650. for one rent may depend upon several titles* L. P. R. 157.

12. *Tenants in common cannot join in avowry, but ought to avow severally for rent; admitted.* Carth. 340, 343. Hill. 6 W. 3. B. R. Ward v. Everard.

*mitted.*———Ld. Raym. Rep. 422. Hill. 10 W. 3. S. C. & S. P. admitted.———5 Mod. 25. Trin. 7 W. 3. Ward v. Evans, S. C. & S. P. admitted; but *ibid.* 27. Arg. admitted, that tenants in common may join in avowry for *damage feasant*, and so in *trespass*.

1 Salk. 390.  
pl. 2. Hill.  
10 W. 3.  
B. R. S. C.  
& S. P. ad-

### (A. a) Certainty in an Avowry.

1. **RECAPTION**, *supposing that the defendant distrained him for homage, and after distrained him for the same cause, and the defendant said, that the second distress was for rent arrear, to which the plaintiff said, that nothing arrear; & non allocatur; because in recaption the plaintiff ought to maintain that the second distress was for the first cause; quod nota; and per Thorp and Finch. a man shall have recaption without avowry made, and before avowry made, and after Belk. maintained that he took for the first cause, and the others e contra.* Br. Recaption, pl. 2. cites 45 E. 3. 4.

2. *Hors de son fee in recaption by way of replication when the defendant has justified for other cause parcel of the seigniori, is no plea; for nothing shall come in debate in recaption but only if the second distress was for the first cause; for if he distrains twice for one and the same cause, he does a tort, be the first cause right or wrong.* Br. Recaption, pl. 3. cites 47 E. 3. 7.

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3. And

3. And a man shall not make avowry in recaption, or have return in recaption as in replevin. Br. Recaption, pl. 3. cites 47 E. 3. 7.

4. Avowry by tenant in dower, who pleaded assignment of the dower to him, &c. he need not to shew the day of the assignment. Br. Avowry, pl. 44. cites 1 H. 4. 63.

5. And in avowry by the heir, he need not to shew the day of the death of his ancestor; quod nota inde. Ibid. 1.

6. Avowry upon the plaintiff, because W. held of the defendant by fealty, and 20 s. per ann. which was arrear by 10 years, and for 4 L. for the first 4 years he avowed upon the plaintiff, who was incoffed by W. and alleged seisin by the hands of W. and did not shew if the arrears were in the time of W. or in the time of the plaintiff, and yet well. Br. Avowry, pl. 38. cites 7 H. 4. 14.

7. Contra where the lord purchases the seignory; for there he shall shew, &c. Br. Ibid.

8. And it is no plea that the plaintiff held by 4 d. per annum, which he proffered without saying that the lord accepted of it, for if he did accept it he shall be excluded of the rest, nota. Br. Avowry, pl. 38. cites 7 H. 4. 14.

9. Avowry was for a fine for alienation upon a custom that every tenant ought to pay a fine for every alienation, and did not shew any certainty of the fine, nor allege any seisin of G. of Clare by whom he conveyed, but in E. mesne in the conveyance, nor he did not say that the land was held of G. of Clare, lord of the honour aforesaid, as of the honour of G. for then it may be that it is held of him as of another lordship or manor; and for those causes the avowry was held insufficient. Br. Avowry, pl. 46. cites 14 H. 4. 2.

10. In recaption, the plaintiff counted that the defendant at another time distrained him for such cause, and after distrained him again for the same cause scilicet, for 2 s. of rent service pending replevin of the first taking, scilicet, vi & armis ac contra pacem & statutum, and the defendant demanded judgment of the count, because he did not count that the defendant made avowry of the first taking; for otherwise it cannot appear if the last was for the first cause, & non allocatur; for he may aver the first cause, and that the second distress was taken for the same cause, per Bab. & opinionem Curie, and the writ by him is good, contra pacem & statutum, but not vi & armis; but contra Newton, for it does not appear at first if he who distrained was lord or not, therefore it may be well vi & armis by him, contra Babbington. Br. Recaption, pl. 1. cites 9 H. 6. 1.

11. If a man distrains for 2 oxen, and the tenant brings replevin but of one only, the defendant may shew that he took this and another, and avow the taking of both, and have return of both upon the matter. Br. Avowry, pl. 147. cites 21 E. 4. 6.

And Ibid,  
says, see re-  
turn de  
avers in  
Fitzh. 2.  
he shall have  
return of those which are omitted out of the plaint immediately upon the avowry.

Br. Reple-  
vin, pl. 2.  
cites S. C.

12. In replevin, the defendant distrained 20 beasts, the plaintiff complained but of 10 beasts taken &c. and the plaintiff was nonsuited, and

and the defendant avowed for the taking of the 10 beasts of which the plaint was, and for the other 10 of which no plaint was, and well, but he need not make avowry for more than are comprised in the avowry, quod nota. Br. Avowry, pl. 62. cites 14 H. 7. 1.

13. Per Vavisor, where the lord himself makes avowry de son tort, &c. is no plea, but shall answer to the tenure; contra where the bailiff of the lord makes consufance. Br. De son Tort &c. pl. 53. cites 16 H. 7. 3.

14. A man made avowry for aid for making sons knights, because the plaintiff held of him by the third part of a knights fee, and ill, because he does not shew what is a knights fee. Br. Avowry, pl. 114. cites 13 H. 8. 11.

15. An avowry is in the nature of a declaration, and ought to contain sufficient matter, whereupon he may have judgment to have a return; but if the avowry, or any declaration or replication, &c. wants form, or omits circumstances of time, place, &c. there the plea of the other party may salve such imperfections, but cannot supply defect of matter of substance, adjudged. 7 Rep. 25. a. Trin. 42 Eliz. C. B. Butt's Case.

16. Replevin of taking in C. the defendant made consufance for damage feasant; the plaintiff replied, that C. contained acres (leaving a blank for the number) and that he was seised in fee of 100 acres, parcel of the said common, and so prescribed to have common in the residue of C. as appurtenant to the said 100 acres. The prescription was traversed, and found for the plaintiff; it was moved that the plaintiff having left a blank for the number of the acres, non constat what the residue were in which he prescribed to have common, but adjudged per tot Cur. præter Williams for the plaintiff, because in this action he was not to recover any land but damages only, for the unlawful taking; besides it is agreed on both sides, that there was a residue of common, and so the jury have found, and whether it is more or less it is all one, because whatever it be, the plaintiff ought to have common there. Yel. 146. Mich. 6 Jac. B. R. Cope v. Templer.

17. Replevin, the defendant avows for damage feasant, as in his freehold in Corringham; the plaintiff replies that he is seised of a messuage and 14 acres of land, and prescribes for common in the place where, &c. all times of the year, tanquam eid. messuagio & terr. spectant. Issue thereupon was found for the plaintiff, and now moved in arrest of judgment, that this bar to the avowry does not shew in what vill the messuage and land are, whereto he claims the common, and of that opinion was the whole Court; and although it be after verdict, yet it is jeofail; and ordered that the party replead. Cro. J. 238. pl. 2. Pasch. 8 Jac. B. R. Broxholme's Case, Sir John Thorold.

Yelv. 177.  
S. C. accordingly.  
—Brownl.  
188. Bras-  
call v. Tho-  
rold, S. C.  
seems to be  
a translation  
of Yelv. 177.

18. In replevin, the defendant avowed in the right of B. and shewed that H. held of A. the father of B. by escuage and rent, &c. and that the seigniorie descended to B. and so avowed the taking for 10 l. rent for 20 years, quæ eidem a retro fuerunt; it was assigned for error that the avowry was ill, because it did not set forth that  
all

*all the rent was due to B. for some of it might be due to A. the father ; but per Coke if it cannot appear that all was due to B. the son, it would be erroneous, but here it doth appear to be all due to him ; for it is alleged that a retro fuerunt to him, and judgment affirmed. 1 Roll Rep. 50. pl. 19. Trin. 12 Jac. B. R. Harwood v. Paramour.*

[ 400 ] 19. In replevin, the defendant avowed for rent, and made title by a grant of the rent out of the tenements aforesaid, whereof the caption aforesaid is supposed per nomen of all his land, which was not then in lease, and did not then aver that the place where the caption was, was out of lease at the time of the grant. The plaintiff was nonsuited, and this was moved in arrest of the return, that the avowry was not good, and so held Bridgeman, notwithstanding that it was alleged that the grant was out of this land per nomen ; but per Haughton contra, the grant being alleged de tenementis predictis is a sufficient averment, that it was not in lease at the time ; and Dodderidge and Croke seemed to the same intent, and judgment was given accordingly for the avowant. Roll Rep. 422. Trin. 14 Jac. B. R. Fawknor v. Fawknor.

Cro. C.  
103, 104.  
pl. 4. S. C.  
adjudged ac-  
cordingly.

20. Conusance was for 20 s. part of the rent of 15 l. arrear, and for 40 l. parcel of 200 l. arrear for nomine poenæ, and did not say in his avowry that he was satisfied of the rest ; and therefore judgment was given for the plaintiff. Hutt. 96. Hill. 3 Car. Holt v. Sambach.

21. In avowry for damage feasant, the plaintiff in bar prescribed for common to two acres of land, and that he put in his beasts to common there ; upon a general demurrer the bar was held ill, because he did not say that the beasts were levant and couchant there, and the Court held it ill without special demurrer, but agreed that it is cured by verdict. Lev 196. Mich. 18 Car. 2. B. R. Cheadle v. Miller.

2 Show. 26.  
pl. 16.  
Edgcomb  
v. Burdell,  
S. C. ad-  
judged for  
the avow-  
ant, nisi,  
&c. They  
should have  
tendered a  
farthing,  
and it would have been well enough, because there is no less coin.

22. In replevin the defendant avowed the taking for the 3d part of a penny, rent due at Michaelmas, reserved upon a lease for 90 years, &c. Upon a demurrer it was objected that the 3d part of a penny could not be taken for it. Sed per Curiam, in the Case of Masham v. Bullen, judgment was given for damages found to half a farthing, and in this case adjudged for the avowant, nisi &c. 2 Jo. 138. Hill. 31 & 32 Car. 2. B. R. Edgcomb v. Burnaford.

Carth. 444.  
Stow v.  
Dally, S. C.  
adjudged in  
B. R. and  
judgment  
affirmed in  
parliament,  
2 Ann.—  
2 Silk. 663. pl. 1. S. C. adjudged accordingly.

23. In avowries the commencement of particular estates must be shown ; as that such a one was seised in fee, and demised, &c. so that it may appear that the estate out of which it was derived is sufficient to support it, because that seisin in fee might be traversed ; and any of the mesne assignments are traversable. Comb. 476. Pasch. 10 W. 3. B. R. Scilly v. Dalby.

12 Mod. 190. S. C. adjudged for the plaintiff accordingly.

In replevin the avowant sets forth, that he was possessed for years, and made an under-lease to the plaintiff,



plaintiff, reserving rent, which being in arrear, he distrained. After nonsuit of the plaintiff it was objected that this avowry was ill, for that it *set forth a particular estate for years, without shewing who had the fee, or the commencement of the particular estate*; but it was held that though that were bad, yet it being after a nonsuit, it was too late; for the interlocutory judgment is such on which a writ of error would lie. 6 Mod. 223. Mich. 3 Ann. B. R. Anon.

(B. a) Plea in Bar or Abatement. Good. And by whom it may be.

1. **WHERE** the avowry is *for rent reserved upon equality of partition, upon partition made between two parceners, it is a good plea that there were 3 parceners, and the third at the time of the partition was out of the country, and came back within age, and re-entered, and the other said that the third after released her estate, abque hoc that she entered, prist, and the others e contra.* Br. Avowry, pl. 68. cites 24 E. 3. 51. 58.

2. Avowry upon K. because W. was seised and held of the plaintiff, and gave to T. and K. in tail, the remainder to their right heirs, and T. died, and K. survived, and he avowed upon K. by 2 d. and the plaintiff said that W. infeoffed T. alone, who infeoffed the plaintiff, who accepted the services by his hands; judgment of the avowry. Finch. and Belk. said he should not have the fee; for he is a stranger to the avowry. But per Thorp, it is sufficient, because he alleges seisin by his hands, and the plea of the stranger to the avowry in form as above, was held good to the avowry. Br. Avowry, pl. 19. cites 41 E. 3. 25.

[ 401 ]

3. And because the defendant avowed the taking of two sheep for 2 d. and 16 oxen for 9 d. and brought a writ for all, he was amerced to 20 s. for excessive distress. Br. Avowry, pl. 19. cites 41 E. 3. 25.

4. Avowry upon A. B. who said that at the day of the taking J. S. was tenant of parcel of the land, and this plaintiff seised of the rest, and held by several services, and as to the seisin it was by *souvent distress*. And per Belk. these several tenures go in abatement of the avowry, by which we pray to be discharged of the rest. Finch. said he does not make his conclusion upon this, but is to avoid the seisin by *souvent distress*, and therefore bid him answer to this, and of the rest to take it by *protestation*, by which issue was taken that he paid of his own free will, and not by *souvent distress*. Br. Avowry, pl. 30. cites 47 E. 3. 4.

5. In avowry against three, the one came, and the plaintiff counted of a taking in S. The defendant avowed in D. *abque hoc* that he took in S. and found for the plaintiff, and he prayed judgment, and the best opinion was that all is discontinued, because the other two defendants did not say any thing, nor no process made nor continued against them. Br. Avowry, pl. 33. cites 49 E. 3. 24.

But Perle and Kirton were clear, that if the one had made avowry for him, and the other two,

process shall not be made against the others; but as here he made it for himself only, and also upon plea to the writ pleaded, &c. to have return, if the plea passed for him; for without avowry in this case he shall not have return, and therefore in this case the process ought to have issued against the other two.

As where  
there was  
lord, mesne,

6. A stranger to the avowry cannot plead in bar to it. Br. Mesne, pl. 12. cites 39 E. 3. 34.  
and tenant, and the mesne was arrear, and the lord distrains the tenant, and the tenant offers the rent, the lord may refuse, and for this mischief process of forejudging was given. Quod nota. Br. Avowry, pl. 6. cites 2 H. 6. 1.

7. In avowry for rent-charge the plaintiff said that the grantor had nothing in the land, where the taking was made before the grant, and the others e contra, and so to issue, which is in effect that the grantor had nothing in the land charged at the time of the gift. Br. Avowry, pl. 35. cites 2 H. 4. 23.

8. Avowry upon N. S. for several services. The plaintiff said that J. N. held of the defendant by one penny for all services, que estate the plaintiff has, which penny he has paid to the defendant, so ought he to avow upon him, judgment. And the issue was taken, if the land was held by divers services or not. Br. Avowry, pl. 37. cites 7 H. 4. 10.

9. In replevin the bailiff made consuance, because N. T. held of the lord by fealty, and for two shillings rent arrear made consuance upon N. T. and the plaintiff said that N. T. levied a fine to W. P. and the lord seised of the services, and after W. P. died seised, and the land descended to three daughters, so ought he to have made consuance upon them; judgment of the consuance, & non allocatur; for he is a stranger to the avowry. Br. Avowry, pl. 41. cites 7 H. 4. 28.

10. Exception was taken that a stranger to the avowry cannot plead in abatement of it, nor otherwise but hors de son fee, or a thing which amounts to as much, is release, and the like. But it was agreed per Cur. that a stranger to the avowry may plead all manner of pleas where his beasts are taken, so that he be party to the record, where the avowry is not made upon any person certain. Br. Avowry, pl. 46. cites 14 H. 4. 2.

[ 402 ] 11. In avowry for rent-charge, the plaintiff said that at the time of the gift he had nothing in the land, judgment; and the opinion of the Court was that it is a good plea. Horton said he was seised at the time of the charge, prift. Br. Avowry, pl. 47. cites 14 H. 4. 30.

12. In avowry the plaintiff said that he tendered the rent upon the land the day that the defendant distrained, and he refused. But per Cockain, the tender ought to have been pleaded to have been at the same time that he distrained, and not the same day; for he may come several times to distrain the same day, and the tender ought to be only when he distrained. Nota. Br. Avowry, pl. 6. cites 2 H. 6. 1.

13. If the lord distrains for two rent-days, and the tenant offers the one, the lord ought to take it. Br. Avowry, pl. 6. cites 2 H. 6. 1.

It is no plea  
in avowry  
for an avow-  
ry is good  
upon the  
disseises, or

14. Non-tenure, or non tenet de illo, is no plea in avowry but where seisin is alleged; [and] in avowry, if the plaintiff can avoid the seisin it is sufficient; by the best opinion. Br. Avowry, pl. 52. cites 8 H. 6. 16.

*Nine in reversion.* Br. Avowry, pl. 43. cites 11 H. 4. 28. — Br. Montemare, pl. 20. cites 8 H. 6. 16. 17. S. P.

15. In replevin, the defendant *avowed severally for two several tenures: of two acres of land upon the plaintiff as tenant of fee-simple, and the plaintiff said, that the father of the defendant by the deed, &c. whose heir he is, gave to him in tail to hold by one entire service; judgment of the avowry, supposing it to be by two several tenures; and per Chaunter, it is not double, that is to say, the tenure of the fee tail, and the sole tenure; because he relied upon the last.* Br. Avowry, pl. 8. cites 9 H. 6. 26.

16. In avowry, *non tenet de illo* is a good plea. Br. Avowry, pl. 129. cites 10 H. 6. for it is a good plea in *cessavit*; but *contra in avowry*; but *hors de son fee and seigniorie* is a good plea in avowry. Br. Avowry, pl. 129. cites 11 H. 4. 11 \*.

Br. Hors de son Fee  
pl. 4. cites  
S. C. See  
tit. Hors de son Fee (B).

— In avowry the plaintiff pleaded *hors de son fee and seigniorie*; or he may disclaim if he will; for he may do the one or the other; quod nota; but see elsewhere that he cannot say that he does not hold of him. Br. Avowry, pl. 144. cites 11 H. 7. 20. — \* This is misprinted, and should be (10).

17. Avowry upon one as upon his very tenant, because he held of him 16 acres of land by 2 s. and for the 2 s. arrear he avowed, &c. The plaintiff said, that he held 32 acres, that is to say, those 16 and other 16 by the same services, &c. *absque hoc* that he held the 16 acres only by the 2 s. and the best opinion was, that it is a good plea without saying *riens arrear* to the parcel; quære, and see the book. Br. Avowry, pl. 124. cites 20 H. 6. 20.

18. Avowry in two places in A. and B. the plaintiff said, that the two places are in C. and D. and not in A. and B. and no plea if he does not shew which place is in one vill, and which in the other; quod nota. Br. Avowry, pl. 130. cites 20 H. 6. 28.

19. In avowry it is no plea that the plaintiff at another time disclaimed against the father of the now avowant, whose heir he is. Br. Avowry, pl. 125. cites 27 H. 6. 2.

20. Avowry upon the abbot of D. because he held of the defendant, and alleged *seisin* in the grandfather of the defendant, and the plaintiff pleaded confirmation of the great-great-grandfather of the defendant made to the abbey of D. and the monks there serving God in frank-almoign, and good, per Cur. because it was ancient deed; but Littleton and Moyle said that it was not well pleaded, because he did not answer to the *seisin* of the grandfather. Br. Avowry, pl. 11. cites 33 H. 6. 22.

21. In avowry, the plaintiff prayed aid of one who came and joined, and would have pleaded in abatement of the avowry, because he alleged *seisin* of the avowry by the hands of J. N. and did not say, then tenant of the land, and it was awarded by all, that the avowry was good notwithstanding this, and also that the prayee cannot plead in abatement of the avowry; admitted by the plaintiff, unless as *amicus Curie*; quod nota; per Cur. Br. Avowry, pl. 12. cites 34 H. 6. 8. 21. [ 403 ]

22. In avowry, the defendant in the replevin made *consuance* as bailiff of his master, and the plaintiff prayed in aid of one W. and he came upon summons ad auxiliand. and joined and pleaded in abatement

*abatement of avowry, because where he alleges seisin of the services by the hands of J. P. because he did not say, then tenant of the land, and per omnes he need not; for it suffices in avowry, cessavit or escheat, that he held of him, &c. and the reason seems to be, because there may be lord, mesne, and tenant, and this is for the services of the mesne, or it may be that the tertenant had made a lease for life, and that the avowry is made upon him by his reversion; quod nota; but it was said there, that several avowries were made which said, tunc tenens terræ, &c. and this is the surest way if it be true. Br. Avowry, pl. 14. cites 34 H. 6. 21.*

23. *If the tenant in feoffs J. S. and J. S. gives notice to the lord, and yet the lord distrains and avows upon the feoffor, J. S. may join gratis and abate the avowry, though he be a stranger; contrary of a stranger without notice. Br. Avowry, pl. 15. cites 34 H. 6. 46.*

24. *And where there is lord, mesne, and tenant, and the lord distrains the tenant, and avows upon the mesne, the tenant shall not have aid of the mesne, but the mesne may appear and plead, for he is party to the avowry, and this is all in person, as it seems, and at the first day, and every stranger upon whom the avowry is made may appear gratis, and plead either in abatement or in bar, though he be not party to the replevin. Br. Avowry, pl. 15. cites 34 H. 6. 46.*

25. *In avowry, the writ was abated, because no place of taking was put in the declaration, and yet the defendant cannot have return without making avowry, though the place of taking be wanting. Br. Avowry, pl. 126. cites 35 H. 6. 40.*

26. *Avowry was made, because F. was seised of 20 acres of land, and held them of K. the lord, by such services, and alleged seisin in N. the estate of which F. one A. had, and after A. gave the manor to T. C. now defendant in fee, and that the said A. then tenant of the land attorned by a penny, the estate of which A. the plaintiff has, and for 20 d. arrear after the grant and attornment he avowed; the plaintiff said that H. P. was seised of the premises in fee, and leased to the said A. for term of life, and after H. P. granted the reversion to the plaintiff, and two others in fee, to whom the said A. attorned, absque hoc that the said A. was seised of any other estate at the time of the first attornment, &c. and this is an ill plea for the one part, viz. the grant made to the plaintiff, and to another it went in abatement of avowry, because it ought to have been made upon both; and the other matter, viz. the estate for life at the time of the attornment, goes in bar of the avowry, and also there is no privity between F. tenant and H. P. tenant, nor any tenure between H. P. and K. the lord, and therefore held an ill bar. Br. Avowry, pl. 17. cites 35 H. 6. 51.*

27. *By which Choke changed his plea, and said that F. was seised, and held &c. who infeofed the said H. P. who gave notice to K. the lord, and after H. P. leased as before, &c. and after granted the reversion to the plaintiff, and the tenant attorned, absque hoc that the said A. tenant was seised of any other estate at the time of the attornment; and per Wangf. he ought to traverse that A. had not the estate of F. tenant; quære; for it was adjourned. Ibid.*

28. A-

28. Avowry, lord and tenant by knights service, the tenant leased for life, rendring rent, and after granted the reversion to W. in fee, the tenant attorned, and W. died, his heir within age, and the lord seised him, and for the rent of the tenant for life arrears the lord avowed, and concluded the taking good and lawful by the matter, and in the land as within his fee and feignory, and well without other conclusion; and so fee, that guardian shall avow upon the special matter, and not upon his tenant or very tenant, &c. Boef. said the tenant did not attorn to the grantee, *prij*, and a good issue; for he is a stranger to the avowry, who can plead nothing but hors de son fee, or a thing which amounts to as much, and now he cannot plead hors de son fee generally, by reason that the land is held of the lord in chivalry; but if the tenant did not attorn, it is hors de son fee as to this rent reserved upon the lease for life, quod fuit concessum, and the issue taken ut supra. Br. Avowry, pl. 83. cites 38 H. 6. 23.

29. Where the tenant holds by 2 d. and the lord incroaches 4 d. the tenant shall not discharge it in avowry. Br. Avowry, pl. 91. cites 5 E. 4. 87. per Danby Ch. J. and Choke J.

But per Thring and Hill. he may rebut in avowry by the deed. Br. Avowry, pl. 91. cites 5 E. 4. 87.

30. Note that levied by distress is a good plea in debt, and in avowry not. And rien arrears is a good plea in avowry. Br. Avowry, pl. 136. cites 9 E. 4. 27.

In replevin, the defendant avowed upon H. O.

etc. as upon his very tenant, the plaintiff said, this same H. O. leased to his sene for life, by which he had nothing but in jure uxoris, and prayed aid of her, and the aid granted, and after the plaintiff waived it, and said rien arrears the day of the taking, and per Newton and Afcue J. this plea doth not lie in your mouth who are a stranger to the avowry; for a stranger shall only plead hors de son fee, or a thing which amounts to as much. Br. Avowry, pl. 56. cites 22 H. 6. 2.

And per tot. Cur. levied by distress, and so rien arrears, is no plea for a stranger to the avowry, but as here the plaintiff may have aid of the sene, and then they may have aid of the lessor, and then they all may plead rien arrears or disclaim. Ibid. — S. C. cited 9 Rep. 20. a. in the case of avowries. — Br. Avowry, pl. 144. cites 21 H. 7. 20. S. P.

31. Debt upon a lease for years rendring rent, a tender of the rent upon the land, and refusal by the plaintiff is no plea; contrary in avowry. Br. Avowry, pl. 140. cites 14 E. 4. 4.

32. If a man distrains for my rent, and gets seisin, and I release to him, this is no bar to me in avowry upon the tertenant for the same rent, for the release is no admission of disseisin. Br. Avowry, pl. 134. cites 15 E. 4. 8.

33. Avowry was made inasmuch as J. S. was seised of 10 acres of land, and held of him by fealty, and 10 s. of rent of which he was seised as by the hands of his very tenant, and had issue A. and died, and A. married the plaintiff, and had issue between them, and after A. died, by which he avowed upon the plaintiff as upon his very tenant by the manner; and the plaintiff said, that he held those 10 acres and other 10 acres by the said rent of 10 s. and fealty, absque hoc, that he held the 10 acres only by those services where the avowry conveyed the tenancy of J. S. to the plaintiff, which the plaintiff did not deny; and per Brian, Choke, and Jenny this is no good bar, without *serv-*

ing how he came to the one 10 acres, and to the other 10 acres, because the plaintiff did not deny the conveyance alleged in the avowry. Br. Avowry, pl. 100. cites 18 E. 4. 17.

[ 405 ] 34. Avowry may be made because the plaintiff held of him 20 acres of which, &c. by homage, fealty, and escuage, notwithstanding that he does not avow that he held of him as of his manor; and where a man pleads jointenancy in avowry with another not named, he ought to shew of whose gift and how, and it is no plea if he does not say that he held jointly with him; for otherwise he is a stranger to the avowry, for a stranger to the avowry may plead in abatement of the avowry made upon a stranger, if he who pleads it be plaintiff, so that he be party to the suit. Br. Avowry, pl. 101. cites 19 E. 4. 9.

35. Replevin of taking his beasts in S. in D. the defendant said that S. is in T. and made avowry for damages feasant, to have the return; and per Pigot and Cur. where he says that S. is in T. he ought to say *absque hoc*, that is in D. for this traverse goes in abatement of the writ, and so he did, &c. Br. Avowry, pl. 103. cites E. 4. 2.

36. In avowry by the issue in tail for a rent-charge intailed, a feoffment of the ancestor of the land out of which, &c. discharged of the rent, with warranty and assets descended, is no plea; for the avowant is not to recover any rent, for he is in possession by his avowry, and shall only have return, and therefore is no bar. Br. Avowry, pl. 79. cites 21 H. 7. 9, 10. Per Vavisor J.

37. Replevin and avowry made of rent-charge granted by feoffee seized to another use, the plaintiff pleaded in bar to the avowry, a release made by cesty que use to feoffee in use after the grant of the rent; and per Cur. because the avowry is made upon the land, as the land charged to his distress, and upon no person certain, therefore every stranger, who has an interest, may plead in bar of the avowry. Br. Avowry, pl. 61. cites 14 H. 8. 4.

38. And that where there are lord, mesne and tenant, the tenant may plead release made by the lord to the mesne, and the tenant may plead that the lord has granted the seigniority to a stranger, to whom he has attorned; and see 14 H. 4. 2. the record of the case of Gloucester fee accordingly, that a stranger to the avowry without rivity may plead in bar of the avowry, where it is not made upon any person certain; and so it is at this day, where a man makes avowry upon the land for rent service upon the statute of 21 H. 8. and so it is put in ure. Ibid.

The defendant avowed on the statute infra feodum & dominum

upon a stranger;

the plaintiff said non tenuit generally, without alleging tenure de aliquo, and traversed the tenure alleged, but ruled ill; and held that he might have all pleas which he might have at the common law, besides disclaimer; for he might traverse the tenure, or plead hors de son ice, but not plead non tenure generally at the common law. Cro. J. 127. pl. 16. Trin. 4. Jac. B. R. *Paramor v. Chapman*.

40. 32 H. 8. cap. 9. Enacts that *no person, &c. shall hereafter make any avowry or conuſance for any rent, ſuit or ſervice, allege any ſeiſin of any rent ſuit or ſervice, in the ſame avowry or conuſance in the poſſeſſion of his anceſtor, predecessor, or his own, or of any other whoſe eſtate he pretends to have, above 40 years next before the making of ſuch avowry or cogniſance.*

It was reſolved per tot Cur. that theſe words muſt be underſtood where the avowant was compelled

to allege ſome ſeiſin by force of ſome ancient ſtatute of limitation, and this was when the ſeiſin was material, and of ſuch force as it could not be avoided in avowry, though it was by incroachment, as in caſe of a rent between lord and tenant, but in caſe of a reſervation or grant of a rent, there the deed is the title, and the commencement thereof appears, and no incroachment in this caſe ſhall hurt, nor is any ſeiſin material; ſo of a gift in tail ſince the ſtatute de donis rendering rent, there no ſeiſin is requiſite, becauſe the reſervation is the title, and the commencement thereof appears within time of memory; and this conſtruction ſtands with the letter of this act, the words whereof are, viz. (No man ſhall make avowry and allege any ſeiſin, &c.) by which it appears that this branch extends only where the avowant ought to allege ſeiſin, but when no ſeiſin is requiſite, it is out of the letter and intent of the act, for the intent is to limit a time for the ſeiſin, in caſes where ſeiſin was required by law to be alleged, and not to compel any to allege it where ſeiſin was not neceſſary before. 8 Rep. 65. a. Mich. 6 Jac. Forſter's Caſe. — S. P. Cro. C. 80. Falkner v. Bellingham. — And ſaid that laches of 100 or 200 years will not prejudice. Ibid. 82. by Yelverton and Hutton J. — A rent mentioned in an act of parliament, or a deed, by way of reference to an ancient tenure ought to be ſhewn, and ſeiſin proved, and ſo where there is a ſaving of all rents, for nihil certi implicat; but of a rent newly created it is otherwiſe. Cro. C. 215. Falkner v. Bellingham. — A bill was brought to be relieved touching a rent charged by will on lands, defendant pleaded the ſtatute of limitations, and that there had been no demand or payment in 40 years; per Cur. the Caſe in Coke's Report. on the ſtatute of H. 8. concerns only cuſtomary rents between lord and tenant, and not rent that commences by grant, or whereof the commencement may be ſhewn. 2 Vern. R. 235. pl. 218. Trin. 1691. Collins v. Goodall. — See tit. Limitations (A), pl. 6. F. 4. and (M) pl. 5.

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41. The avowant need not in his avowry ſhew ſeiſin within 40 years, but it ſhall come in on the other ſide, viz. not ſeiſed of the ſervices after the limitation. 8 Rep. 65. a. cites it as adjudged 14 Eliz. D. 315. [b. pl. 101.] in Warring's Caſe.

S. C. cited 9 Rep. 26. a. — S. C. cited Cro. C. 43. — Hett. 81.

S. C. cited by Harvey J.

42. There are 2 diverſities in law; 1ſt, that a ſtranger to the avowry ſhall plead nothing but hors de ſon fee, or what is tantamount, and this true as to the pleading any matter in bar as to the avowry; but the right tenant, though he be a ſtranger to the avowry, yet being made party, ſhall plead matter in abatement of the avowry. 9 Rep. 20. b. in the Caſe of Avowries.

43. Another diverſity is, when leſſee for life or for years ſhall have aid of one who is a ſtranger to the avowry, and when not; for upon ſuch general allegation that ſuch a ſtranger was ſeiſed in fee, and leaſed to him for life or years, he ſhall not have aid, becauſe it would be in vain to grant aid when the leſſee may plead hors de ſon fee, as well as his leſſor; but upon ſpecial matter diſcloſed he ſhall have aid of his leſſor, who is the very tenant. 9 Rep. 20. b. in the Caſe of Avowries.

44. Lord and tenant by fealty and rent. The tenant made a leaſe for years, and the leſſor had done fealty to the lord, and paid his rent conſtantly, and yet the lord diſtrained the cattle of the leſſee for rent, where in truth none was arrear, and avowed upon a mere ſtranger as his very tenant. In this caſe the leſſee may allege that his leſſor was, and yet is, ſeiſed of the tenancy, and he eſſee ſhall

have aid of his lessor, and the false avowry upon a stranger shall not hurt the lessee. 9 Rep. 20. Case of Avowries.

Brownl.  
175. S. C.  
but S. P.  
does not ap-  
pear.—

Hob. 108.  
pl. 131.  
S. C. says  
it was agreed  
that if the  
lord will  
take the be-  
nefit of the  
statute to

45. The lord of the manor avows the taking a *distress* in the land of his very tenant, held of him as of the manor for suit of court; and the beasts taken were the *beasts of the lessee of the very tenant* who was a stranger to the avowry, for which exception was taken that he should not plead to the avowry; but because the avowry was not made on the person, but *upon the land*, according to 21 H. 8. the Court resolved that the lessee shall not plead any plea in bar of the *avowry* but *hors de son fee*, or disclaimer. Mo. 870. pl. 1208. Trin. 13 Jac. Brown v. Goldsmith.

avow, as upon land liable to his distress, as here for rent-service, and so handle it as a rent-charge, then the statute is indifferent to both, that the other may defend according to the same rules; for now the privacy of the person tenant is removed on both sides, and the charge of the land is only in question. Now where the avowing was only upon the land, as in case of customary profits, as a fine for alienation, or a rent-charge, there the plaintiff at common law might plead any discharge, though he were a mere stranger, and had nothing in the land.——Mar. 167. S. C. cited by Foster J. as adjudged accordingly in case of a rent-charge.——S. P. by Raymond J. Raym. 255. and says, that as by that statute the avowant is not tied down to avow upon any person in certain, but upon the land as within his fee or feignory, so the tenant of the land, by the equity of that statute, is allowed to plead any plea to save and discharge his goods from the distress, and cites Hob. 108. S. C.

S. C. cited  
by Raymond  
J. Arg.  
Raym. 255.

46. The defendant *avowed for rent*, for that *D. held of him by fealty and rent, whose estate the plaintiff had*. The plaintiff replied that *D. infeoffed W. who made a lease to the plaintiff for life, absque hoc that he had the estate of D.* Resolved that the traverse is void; for after the statute of 21 H. 8. the party is to avow upon the land, and then it is not material what estate the tenant had, so he occupied the land; but before the said statute it had been a good plea, and so the statute hath changed the law for the traverse in pleading, although there is not any word thereof in the statute. Mo. 883. pl. 1238. Trin. 13 Jac. C. B. Kingwell v. Crawley.

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47. In a second deliverance the defendant makes *cognizance* as bailiff to T. M. and set forth that *T. M. father of the said T. M. was seised of the manor of M. of which the land in question is parcel*, and that the said lands are held by fealty and certain rent, and *derives the tenancy to Sir A. C. and the feignory to the said T. M. the son; and as bailiff to him makes cognizance for fealty, ut infra feodum & dominicum sua*. The plaintiff *protestando quod non tenet*, pro placito dicit that the defendant took the cattle as in the count, *absque hoc that M. the father was seised of the services infra tempus*. The defendant demurs. Banks, Crawley, and Foster resolved that the plea was good, though no title was made by the plaintiff or his master. Reve J. wavered in the point; but the others were positive in it, and Banks gave the reason, that as at the common law the tenant might plead any plea in bar to an avowry for a rent-charge, as 8 E. 4. 23. a. is, so now, since the statute, the *tenant shall plead any plea to discharge the land from the distress*. 2dly, That as the statute hath always been construed favourably for the benefit of the lord, so it ought to be for the benefit of the tenant. 3dly, That it is no reason that the tenant shall have

his



his goods taken, and not use all ways to redeem them, when not party to the wrongs. Raym. 255. Raymond J. cites Mar. 166. Hill. 17 Car. 1. C. B. Layton v. Grange.

48. In replevin the defendant made *consuſance for an heriot as bailiff to T. S.* The plaintiff replied that *A. and B. as bailiffs to the ſaid T. S. at another time made conſuſance in C. B. and ſets forth the record at large, prout patet, &c.* Upon a demurrer it was objected that it was ill, becauſe the plaintiff did not ſet forth that the *conſuſance in the C. B. was made by the aſſent of T. S.* For it might be made by a ſtranger without his privity, to which the Court inclined; ſed adjournatur. 2 Lev. 210. Mich. 29 Car. 2. B. R. Ingram v. Bray.

Vent. 314. Tothill v. Ingram, and Mod. 216. pl. 4. Ingram v. Tothill & Ren. And 2 Mod. 281. Tievil v. Ingram, ſeem all to be S. C. but

S. P. does not appear in either.—3 Keb. 785. pl. 36. S. C. & S. P. and judgment for the avowant affirmed, niſi.—Ibid. 829. pl. 59. S. C. & S. P. and the Court, praeter Twiſden, agreed that the conſuſance being pleaded in hæc verba, it is well enough; for the conſuſance appears to be by his order.

49. Plaintiff in replevin may plead *riens in arrear*, or any other plea, though he be a ſtranger, and doth not make any title to the land. Reſolved. Raym. 258. Hill. 30 & 31 Car. 2. C. B. Johnson v. Grant.

50. In replevin the defendant avowed, and ſhewed that *A. B. was ſeiſed in fee, and made a long leaſe rendring rent, and conveyed the reversion to the plaintiff, and for rent arrear he diſtrained.* The plaintiff replies that *A. B. was ſeiſed of one moiety, and C. D. of the other, before this leaſe; that C. D. died ſeiſed of the one moiety, and this deſcended to his ſon, and that the plaintiff had conveyed the other moiety to T. D. by leaſe and releaſe, and traverſes, abſque hoc that the plaintiff was ſeiſed in fee ad aliquod tempus after the ſaid conveyance, &c.* The avowant demurred, becauſe the plaintiff made no title to himſelf, and that he ought to have traverſed abſque hoc that A. B. was ſeiſed in fee *tempore dimiſſionis*, and of ſuch opinion was the Court, and adjudged for the avowant, niſi; yet here the plaintiff had confeſſed and avoided the title made by the avowant. Skin. 402. pl. 36. Mich. 5 W. & M. in B. R. Fuller's Caſe.

51. Defendant in his avowry pleads that the *beaſts belong to a 3d perſon*, and not to the plaintiff, and therefore prays a return. [ 408 ] The plaintiff demurs; for on the avowant's own ſhewing he ought not to have return, having admitted the property of the beaſts to be in another: but judgment was for the demandant; for the prior poſſeſſion was in him, and he has right againſt all but the right owner, and the plaintiff by his demurrer has admitted he has no property in them. Cumb. 477. Paſch. 10 W. 3. B. R. Barret v. Scrimshaw.

52. There can be *no general iſſue* to an avowry, but ſome ſpecial point muſt be traverſed; per Holt Ch. J. 2 Salk. 562. Paſch. 10 W. 3. B. R. Scilly v. Dalby.

53. 11 Geo. 2. cap. 19. Enacts, That *whereas great difficulties often ariſe in making avowries or conſuſance upon diſtreſſes for rent, quit-rents, reliefs, heriots, and other ſervices, it ſhall and may be lawful*

to and for all defendants in replevin to avow or make countenance generally; that the plaintiff in replevin, or other tenant of the lands and tenements, whereon such distresses were made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then and still remains due; or that the place where the distress was taken was parcel of such certain tenements held of such honour, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for, was, at the time of such distress, and still remains due, without further setting forth the grant, tenure, demise or title of such landlord, lessor, or owner of such manor, any law or usage to the contrary notwithstanding; and if the plaintiff in such action shall become nonsuit, discontinue his action, or have judgment given against him, the defendant in such replevin shall recover double costs of suit.

### (C. a) Replication and Traverse.

1. **AVOWRY** for a heriot after the death of J. S. his tenant be-  
riorable. The plaintiff said that J. S. infeoffed him, *absque hoc* that he died seised of the land, & non allocatur; for he shall say *absque hoc* that he died his tenant; for it may be that he leased for life, or made a gift in tail, or that he is lord himself. Br. Avowry, pl. 142. cites 44 E. 3. 13.

\* So are all the editions of Brook; but the Year-book is (Frank-  
almoigne.)

2. In avowry for rent and service as lord in tail, the tenant may make protestation that he holds by \* fealty only, and that where the defendant avows as lord in tail, he has the seignior in fee; judgment of the avowry. Br. Avowry, pl. 143. cites 46 E. 3. 19.

3. **AVOWRY** for 20 s. of rent-service. The plaintiff said that he held by 10 s. *absque hoc* that he held by 20 s. and as to the 10 s. *riens arrear*, and to the other 10 s. *nient seisi*, unless by coercion &c. and an ill traverse; for this implies double matter, by which the traverse was ousted, and the rest of the plea stood. Quod nota. Br. Avowry, pl. 121. cites 30 H. 6. 5.

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4. In avowry for 10 s. the tenant replied that J. N. lord of B. *que estate* the tenant has in the seignior, by deed, which he shewed, confirmed to W. S. then tenant, *que estate* the tenant has in the tenancy, to hold by fealty and 7 d. &c. and the defendant rejoined that the tenant and his ancestors have held of him and his ancestors time out of mind, &c. by homage, fealty, and 10 s. as above, *absque hoc* that he has the estate of J. N. Et non allocatur; for he ought to traverse the confirmation, or that he who confirmed had nothing in the seignior at the time of the confirmation, or that W. S. did not hold of him at the time, &c. and so he did at last; quod nota per tot. Cur. Br. Avowry, pl. 120. cites 30 H. 6. 7.

5. In avowry for damage feasant in 2 acres, parcel of 1000 acres, of which the plaintiff was seised in fee, the plaintiff said that the place was parcel of 800 acres, of which he himself was seised, *absque hoc* that the place was parcel of the 1000 acres, and no plea;  
for

for he *ought to traverse that this was not the soil of the defendant, and not to traverse if it be parcel of the 1000 acres or not; for it may be no parcel at one time, and be parcel at another time.* Quod nota. Br. Avowry, pl. 92. cites 5 E. 4. 117.

6. In replevin, the lord avowed *for fealty, and 2 d. rent, payable at Christmas and Easter; the plaintiff said, that he held by fealty, and 2 d. rent, payable at Midsummer, and not at Christmas and Easter, and of this riens arrear, and as to the fealty he tendered, and the defendant refused, and there the defendant shall not reply to the riens arrear, but shall maintain the avowry that it is payable at Christmas and Easter or not, and so an issue tendered which shall not be tried, and as to the fealty when it is tendered and refused, the defendant cannot distrain for it after without request first made, and this shall be made to the person of the tenant, and not upon the land.* Br. Avowry, pl. 106. cites 21 E. 4. 16.

7. The defendant avows, *that one being seised in fee made a lease to him, and that he took the beasts damage feasant. The plaintiff pleads in bar, and maintains his declaration, and traverses the lease, upon which the avowant demurs, and adjudged a good traverse.* Brownl. 182. Mich. 13 Jac. Hyen v. Gerrard.

8. The defendant avowed, *for that the king was seised of a manor, and a grange parcel thereof, and granted the inheritance to a bishop, reserving 33 l. yearly rent, that the bishop granted this grange to the ancestor of the avowant, in which there was a clause, viz. that if the grantee or his heirs should be legally charged by distress, or with any rent due to the King, &c. then they might enter into B. and distrain till he or they be satisfied: that afterwards the grantee and his heirs, upon a bill against them in the Exchequer, were decreed to pay the king 4 l. per ann. as their proportion, by reason whereof he entered into B. and distrained, and so justified the taking: the plaintiff replied in bar to this avowry, &c. and traversed that the defendant was legally charged, &c. Upon a demurrer the whole Court held this traverse ill, and judgment was given for the avowant.* 2 Mod. 54. Trin. 27 Car. 2. C. B. Calthrop v. Heyton.

9. In replevin, the defendant avowed *taking the goods as his own proper goods.* Plaintiff demurred, because he did *not traverse the property of the plaintiff.* And per Cur. this seems to be sufficient; for the defendant cannot conclude to the country, but the plaintiff ought to reply, and upon that replication issue shall be joined, and the property of the plaintiff must be proved. Comyns's Rep. 247. pl. 137. Trin. 2 Geo. 1. C. B. Loveday v. Mitchel.

## (D. 2) Traverse. Of what.

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1. **I**N replevin, the defendant avowed *upon the plaintiff for certain services, and the plaintiff said, that he held of one A. who held over of the defendant by the services aforesaid; judgment of the*

R f. 4

avowry 2

avowry; and per Marten, he shall take *traverse*, *absque hoc* that he held of him immediately, and so the matter of the plea is good; for it is confessed that he cannot disclaim in this case where there is lord, mesne and tenant, and the lord avows upon the tenant where he ought to avow upon the mesne, but shall plead the matter; for he holds of the defendant by a mesne so that he cannot disclaim. Br. Avowry, pl. 9. cites 9 H. 6. 27.

Br. Avowry, pl. 58. cites S. C. but Brooke says, he wonders that the avowry was made for the amercement, for it ought to have been made for not doing the suit. Br. Avowry, pl. 55. cites 21 H. 6. 39.

2. Replevin of taking the 24th day of August, anno 17 &c. the defendant avowed for amercement for non-feasance of suit of court, which plaintiff owed to the defendant at his court of N. and that he was summoned to be there the first day of September, anno 17 &c. and did not come, and was amerced to 20 s. and avowed for the amercement, *absque hoc* that he took them the 24th day of August, prout, &c. and the issue was accepted, and yet per Newton Ch. J. and Paf-ton J. the traverse ought to be, *absque hoc* that he took them before the said first day of September, for if he took them any day before the first of September he did wrong, for he cannot distrain for suit before the Court; quod nota bene. Br. Traverse per &c. pl. 93. cites 21 H. 6. 39, 40.

3. In replevin, the defendant said, that J. P. was seised in fee of the manor of O. and W. P. was seised of 20 acres of land in fee, of which the place where, &c. is parcel, and held of J. P. as of the manor aforesaid by fealty, and to be bailiff, and to answer the profits of it, of which services, &c. and that J. P. leased the manor to T. C. for term for life, and the tenant attorned by virtue of *cujus seifitus*, &c. the estate of which W. D. the plaintiff has, and at such a court the plaintiff was chosen bailiff of the manor for one year, according to the custom, and the plaintiff refused, by which the defendant as bailiff of the said T. C. avowed the taking upon the plaintiff as upon the tenant of the said T. C. his master by the manor. Markham said, Richard and Robert were seised of the land, &c. before the taking, and leased to the plaintiff for term of years, *virtute cujus* he was possessed, &c. at the time of the taking, *absque hoc* that he had any thing in the franktenement at the time of the taking, and an ill traverse, per Cur. Fulthorp said, the traverse shall be, *absque hoc* that he had the estate of the said J. P. at the time of the taking. But Porting. said, No; for it may be that he is a disseisor, and then he has not his estate; *quare inde*; but the traverse was taken after, *absque hoc* that he was seised in fee at the time of the taking, and then well. Br. Avowry, pl. 58. cites 22 H. 6. 34.

4. Avowry upon replication of taking in S. the defendant made confession as bailiff of A. for a seignior and rent arrear, by which he took in D. and impounded the distress in S. and the plaintiff the same day broke the pound, and took out the beasts, and the defendant took them in S. aforesaid, and a good plea, without traversing the place where, &c. for the defendant has justified two takings. Br. Avowry, pl. 13. cites 34 H. 6. 18.

5. Avowry for tenure of 2 acres by 20 s. the plaintiff said, that he <sup>\*</sup> held those 2 acres, and 2 other acres by 12 s. absque hoc that he held the 2 acres by 20 s. and well, per Brian, and he cannot do otherwise; but Keble e contra; for the quantity of the services may be taken by protestation, and traverse that he did not hold the two acres only; quære. Br. Avowry, pl. 87. cites 8 H. 7. 5.

6. In avowry, the defendant alleged seisin of homage, fealty and rent, and for the rent arrear he avowed, there the plaintiff cannot traverse the seisin of the services but only of the rent; quod nota; by which he did so, and took the seisin of the services by protestation; quod nota. Br. Avowry, pl. 1. cites 26 H. 8. 1.

7. In replevin, the defendant made consuance as bailiff to T. S. for a rent-charge; the plaintiff replied in bar, that the defendant took the distress without the privity or command of T. S. and that such a day J. S. had first notice thereof, and immediately disavowed the taking. Upon demurrer it was adjudged, that this replication is ill, for he should have traversed the being bailiff. 3 Lev. 20. Pasch. 33 Car. 2. C. B. Dobson v. Douglas.

8. In replevin for taking his horse in a certain place called the Common Marsh, the defendant pleaded that he took it in a place called the Plott, and traversed the taking in the Common Marsh, unde petit judicium de narratione, &c. and pro retorno habend. he made consuance under his master's command for rent arrear. The plaintiff replied in bar of the consuance, and traversed the seisin alleged in his master; per Cur. the traverse of the place is only in abatement, and the making consuance pro retorno habendo is right; for otherwise he could not have a return and damages, but the plaintiff should not have traversed the matter of this consuance. 1 Salk. 93. pl. 1. Pasch. 2 W. & M. in B. R. Foot's Case.

9. In replevin, the defendant avowed, for that W. R. was seised, and made a lease to him for one year, and so justified the taking, &c. damage feasant. The plaintiff replied, that true it is, that W. R. was seised, &c. but before he made a lease to the defendant he made another to the plaintiff, which is still in being and not determined; if the plaintiff traverses the lease of the defendant it is good upon a general demurrer, being only in the nature of a double plea, but upon a special demurrer it is naught. 3 Salk. 353. pl. 4. Pasch 9 W. 3. B. R. Anon.

10. In some cases the defendant in replevin alleges property in himself or another, with a direct traverse; and in some cases the plea is, that the property is in the defendant, and not in the plaintiff, which is tantamount to a traverse; for the words (et non) make a traverse; and per Cur. it will be good both ways, and there seems to be no difference, for the defendant might have pleaded property in abatement or in bar, and it would have been good without a traverse, and issue should have been joined upon that, and therefore making consuance or avowry that the property is in himself seems to be sufficient. Comyns's Rep. 247. pl. 137. Trin. 2 Geo. 2. Loveday v. Solomon Mitchell.

(E. 2)

(E. a) Where the *Seisin*, and where the *Tenure* shall be *traversed*.

1. [ 412 ] IN replevin the defendant avowed, and *alleged seisin of the rent by the hands of the plaintiff*, it is a good plea that he never was seised by his hands; for the *seisin* in avowry is traversable, and it is no *estoppel* for the defendant to *shew grant of the services made to him by fine and deed of the plaintiff*, by which he attorned of the *fealty* and other services due, because the services are not expressed. Br. Avowry, pl. 67. cites 24 E. 3. 26, 50.

2. In *trespass* the defendant justified, because the plaintiff held of J. N. by *fealty*, one mark, and 4d. and the defendant as bailiff of J. N. distrained for the rent of one year, and *alleged seisin*, &c. and the plaintiff said that he held by the rent of 4d. and *fealty*, *absque hoc* that he holds by one mark, prout, &c. And per Cur. he may traverse the tenure in *trespass*, though *seisin* be alleged; *contra in avowry*. Note the diversity. But in *trespass* it is not good; for he shall say, *absque hoc* that he holds by one mark, *fealty*, and 4d. by which he said so; for the defendant did not suppose that he held by one mark only. Br. Avowry, pl. 115. cites 10 H. 6. 3.

3. In avowry it is no plea that he holds of J. N. *absque hoc* that he holds of the defendant; for he shall not traverse the tenure; but he may say that, *hors de son fee*, or *disclaim*. Br. Avowry, pl. 116. cites 10 H. 6. 6.

But it is no plea that he holds of J. N. *absque hoc* that he holds of the defendant. Br. Avowry, pl. 116. cites 10 H. 6. 6. — But *absque hoc* that he was ever seised after the limitation, is a good plea; per Cur. Note the diversity. Br. Avowry, pl. 116. cites 10 H. 6. 6.

Br. Traverse per &c. pl. 227. cites S. C.

4. Avowry, because W. B. held certain land, of which &c. of one J. B. as of his manor of F. by *homage*, *fealty*, and *escuage*. The plaintiff said that he held of the lord by a *halfpenny* and *fealty*, &c. *absque hoc* that the lord was seised of the rest of the services, viz. *homage* and *escuage*, &c. Littleton J. said, you ought to traverse the tenure by service of chivalry; for if he denies not the tenure, the *homage* and *escuage* are incident, though he was never seised. Br. Avowry, pl. 96. cites 7 E. 4. 27.

5. But *seisin of homage* may be traversed in avowry for tenure by rent and *homage*; for this is *focage*, to which *homage* is not incident; contrary to knights service. Ibid.

6. If a man *incroaches service of the same nature as the tenure is*. As if a man holds by 12d. and the lord *incroaches* 2s. there he shall traverse the *seisin*. Br. Avowry, pl. 96. cites 7 E. 4. 27.

7. But where he *incroaches* a thing of another nature, as if upon *focage* tenure he *incroaches* service of chivalry, there the tenure shall be traversed, and not the *seisin*. Ibid.

Where the lord avows for that the plaintiff holds of him by other services than are due, as *fealty*, rent, and suit of court, and alleges *seisin* of all, and for the rent arrear avows, where the true tenure was by *fealty* and rent only. In this case the tenure of the suit is not material, because it is of *assize*.

assize.

other quality and nature, and the tenancy originally was not charged with any service of such nature as suit is, and so the tenure is traversable; but if the rent was 2 s. a year, and the lord gets seisin of 3 s. without coercion of distress, there, because the ten now is charged with service of such nature, and it is not to be presumed that the tenant would voluntarily pay more than he ought, there the seisin in avowry is traversable, and not the tenure. 9 Rep. 31. a. Pasch. 42 Eliz. C. B. Bucknall's Case. — Cro. E. 799. pl. 47. S. C. the jury found the tenure by fealty and rent only, and not by suit of court; and the Court held that it was found against the avowant; for in an avowry all the tenure alleged is material, but in trespass or replevin if any part is found it is sufficient.

8. And in avowry upon tenure of two acres by two pence, the tenant may say that he holds the one acre only by 2 d. *absque hoc* that he held two by 2 d. Br. Avowry, pl. 96. cites 7 E. 4. 27.

9. And per Pigot, this case was adjudged that where a man avows for tenure of a barok and fealty, and the other says that he holds of him by fealty and a horse, and traverses the seisin of the barok, this was held no plea; for he ought to traverse *absque hoc* that he holds by fealty and a hawk; for this is of another nature than the first seisin was, and so above he ought to traverse the tenure and not the seisin. But Jenny and Danby Ch. J. held that he ought to traverse the seisin, well enough. And Brooke says that the [ 413 ] best opinion of the Court was with Catesby, Littleton, and Pigot, as it seems. Br. Avowry, pl. 96. cites 7 E. 4. 27.

10. In replevin the defendant avowed for fealty and 20 s. rent. The plaintiff said that he held by 2 d. for all services, and as to the rest not seised, unless by coercion of distress. Jenny said, you ought to say *absque hoc* that he holds by 2 s. but Brian said, No, the seisin shall be traversed in avowry, and not the tenure. Br. Avowry, pl. 99. cites 12 E. 4. 7.

11. Where the plaintiff confesses the same tenure as is in the avowry, and of the same nature, but he holds by less rent, there the plaintiff shall answer to the seisin; but if the defendant avows for service of chivalry, and the plaintiff says that he holds in socage, there he shall traverse the tenure and not the seisin; per Nele J. And per Brian Ch. J. this is a good diversity. Br. Avowry, pl. 104. cites 20 E. 4. 16.

*homage, fealty, and escuage, and 2 s. rent, and alleges seisin by the hands of the plaintiff as his verry tenant, &c. and for 2 s. arrear at Easter he avowed. Vavisor said, advocate non; for you hold this acre by fealty and 2 d. of whose services, &c. absque hoc that you hold of us by homage, fealty, and escuage, and 2 s. rent modo & firma, &c. Per Hufsey, you ought to traverse the seisin, and not the tenure as here; for the escuage made the knight's service, and the defendant has alleged seisin of the other services, and not in the escuage, therefore he shall traverse the seisin of them, viz. of the 2 s. and of the homage; for all this may be socage, and therefore he traversed the seisin of that which made the socage tenure, but not the services of that which made the service of chivalry. And per Hufsey, in avowry for tenure by 10 d. and alleges seisin, &c. the plaintiff may say that he holds of him by a hawk, absque hoc that he holds by 10 d. and not answer to the seisin; quod Brian conceitit. Ibid.*

12. In replevin the defendant alleged that the plaintiff held by fealty and 5 s. rent, and suit of court, from 3 weeks to 3 weeks, &c. and by plowing his land two days in the year, and by 1 d. of aid, and alleged seisin, and for arrear of the land and the 1 d. of aid he avowed. Briggs by protestation said that he did not hold by the rent of 5 s. but held by fealty and 1 d. rent, and suit of court twice a year, viz. such a day for all services, *absque hoc* that he holds to plow his land, or was ever seised

*seised of 1 d. of aid, and of suit to his court, prout &c. and it was agreed that the protestation was well taken, because the defendant did not avow for the rent [mentioned] in the protestation; per Choke J. Br. Avowry, pl. 108. cites 21 E. 4. 64.*

*But where he confesses making of it in the same tenure, then* 13. *And note that of such things whereof he confesses parcel in the same tenure, he shall not traverse the tenure, but answer to the possession or seisin of it. Ibid.*

*notwithstanding the seisin of it before, he may traverse the tenure. Ibid.—As where a man holds by fealty and a horse, and the lord avows for rent or suit, the plaintiff may say that he holds by the fealty and horse, absque hoc that he holds by rent or suit, and not answer to the seisin, because the incroachment of another thing by which the tenant does not hold, is void, and the seisin of it is void; but contra of incroachment of such thing by which the tenant holds in fact; as where he holds by suit once a year, and he incroaches from three [weeks] to three weeks, or if he holds by a d. and he incroaches 3 d. in those cases he shall answer to the seisin. Note the diversity. Ibid.*

*For where they do not agree in tenure, as the one says service of chivalry, and the other fealty as above, the tenure is traversable. Ibid.—*

*But where they agree in tenure, but not in the parcels or seisin, there the seisin is traversable, and not the tenure. Note the diversity. Ibid.*

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4 Rep. 9. in Bevin's Case, says that this opinion of Brooke seems not to be law; for the case of the ward is the stronger case.

15. *But where a man holds by rent and service of chivalry, and the lord and his ancestors have been always seised of the rent, but not of the homage nor ward; yet if the ward falls, he shall have the ward of the heir; for the seisin of the rent suffices to be seised of the tenure, as to this purpose. But Brooke says otherwise it seems of making avowry. Br. Avowry, pl. 96. says it was held by the justices of both benches, Pasch. 7 E. 6.*

16. *It was said that anno 23 H. 6. it was held by all the justices, that in avowry unques seisie generally of the services is no plea, but shall be compelled to traverse the tenure. Br. Avowry, pl. 56.*

17. *But unques seisie, generally of such a parcel of the services after the limitation, is a good plea. Ibid.*

18. *Or unques seisie of the services by his hand is a good plea. Ibid.*

19. *But per Priot, if a man incroach 20 s. upon me by coercion of distress, who do not hold of him, I shall not avoid it by saying that the seisin was by coercion of distress, but shall be compelled to traverse the tenure. Ibid.*

20. *But where it is a tenure by fealty, and the lord incroaches rent, he shall say that he holds by fealty only, and as to the rest seised by coercion of distress. Ibid.*

21. *In replevin, &c. the defendant justified the taking, &c. for*



for that the locus in quo, &c. was the freehold of C. and that he as servant took the cattle there damage feasant; the plaintiff replied, that long before C. was seised, one J. S. a stranger was seised, and so conveyed a title to himself from J. S. but took no traverse to the freehold alleged in C. The Court held clearly, that the plaintiff should have traversed the freehold of C. and Williams J. said it should have been thus, (viz.) *absque hoc*, that the same was the freehold of C. *tempore captionis*, and judgment for the avowant. Bulst. 48. Mich. 8 Jac. Pompier v. Chamberlaine.

22. Avowry set forth that C. was seised of one messuage, two barns, one mill, &c. and 100 acres of land, &c. in W. and held them of B. by 20 s. rent, fealty and suit of court; the plaintiff replied that C. held 40 acres by 9 s. rent, fealty, and suit of court, *absque hoc*, that he held modo & forma. The question was whether he ought to traverse the seisin or the tenure, and it was likewise objected that here was double matter, for that the conclusion founds in bar of the avowry, and likewise in abatement of it; but Hobart and Winch (only present) held the traverse good and not double; and Hobart said that true it is that if the lord had seisin of more than the very services, in this case it may not be avoided in avowry, and no false tenure shall be avoided, &c. but when he joins another falsity, and that is in the quantity of land. Now the false quantity of the rent had made the tenure traversable, and the judgment was commanded to be entered accordingly. Winch. 18. Mich. 19 Jac. Davies v. Turner.

Brownl.  
172. Tur-  
ney v.  
Darnes  
S. C. held  
accordingly  
by two jus-  
tices.

## (F. a) Judgment. How. Writ of Inquiry, and Costs, and Damages.

1. BY judgment in avowry, the defendant shall not have by this *scire facias*, for he has only return, which does not prove any seisin; for he shall not recover rent, and therefore cannot have *scire facias* of the rent, nor of the arrears to recover them, quod nota by award. Br. Avowry, pl. 79. cites 21 E. 3.

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2. Where demurrer is upon plea in abatement of avowry, the judgment shall be to answer over, and it is not peremptory; per Finch. and the reporter. Br. Avowry, pl. 31. cites 48 E. 3. 8.

3. Avowry for rent and services, the plaintiff was nonsuit, and the defendant had return, and the *retorno habendo* was returned *nihil*, by which *withernam* issued, which was in the end *pone per vadias & salvos plegeos*, the plaintiff to answer as well our lord the King for the contempt, as the party of damages and injuries done to him, where damages at this day were not given to the defendant in avowry, and the sheriff returned *nihil*, by which issued 3 *capias's* and *exigent*, and the plaintiff was outlawed, quod nota, and sued charter of pardon thereof against the defendant, who came and counted of damages, and all as above, by which the plaintiff demurred, and by the best opinion, because the defendant cannot have damages upon the avowry, he shall not have damages upon the *wither-*

*nam*

*nam* which is *founded upon it*. But Brooke says, that at this day damages are given in avowry for rent or services by the statute of [21 H. 6.] capitulo 19. Contra for damage feasant. Br. Damages, pl. 16. cites 35 H. 6. 47.

4. Where a man *distraints* for homage, fealty, &c. *which he may have to be made to him*, there he shall have the same thing. Br. Avowry, pl. 89. cites 9 H. 7. 22.

5. But where he *distraints for a thing which is past*, as suit of court, reaping of corn, &c. there he may *distrain*, and yet shall *not have the thing but damages* by the discretion of the justices, *quod nota*. Ibid.

6. 21 H. 8. cap. 19. §. 2. *In any replegiare or second deliverance for rents, customs, service, or damage feasant, if the avowry, consufance or justification be found for the defendant; or the plaintiff be nonsuit or otherwise barred, the defendant shall recover such damages and costs as the plaintiff should have had if he had recovered.*

7. In replevin by O. against A. B. and C. for taking a horse, A. avowed, and B. & C. made consufance for 11 d. rent service arrear due by O. to A. and found for the defendants, and 2 d. damages to all 3 defendants; and judgment was given accordingly, that they should recover *damna sua prædicta per juratores assessa* &c. but because B. and C. made consufance generally, and not as bailiffs nor as servants to A. and the consufance in itself a title and a justification in the right of another, and damages given to all 3, and B. and C. who made consufance had no right to recover any thing, the judgment was reversed. Yelv. 108. Mich. 5 Jac. B. R. Owen v. Williams.

In replevin the defendant avowed for a rent-charge, the plaintiff pleaded in bar non concessit; issue was taken, and the jury found the value of the cattle but not the arrears. The Court held that he might have his judgment according to the common law, but the words of [416] this statute show that it shall be

8. 17 Car. 2. cap. 7. §. 2. *When any plaintiff in replevin shall be nonsuit before issue joined in any of the King's courts at Westminster, the defendant making a suggestion in nature of an avowry or consufance for such rent, to ascertain the Court of the cause of distress, the Court upon his prayer shall award a writ to the sheriff, to enquire by the oaths of 12 men touching the sum in arrear at the time of such distress taken, and the value of the goods distrained, and thereupon notice of 15 days shall be given to the plaintiff or his attorney of the sitting of such inquiry; and upon the return of such inquiry, the defendant shall have judgment to recover against the plaintiff the arrears of such rent, in case the goods distrained shall amount unto that value, and in case they shall not, then so much as the value of the said goods shall amount unto, together with his costs, and shall have execution as the law shall require.*

9. *And in case such plaintiff shall be nonsuit after consufance or avowry made, and issued joined, or if the verdict shall be given against such plaintiff, then the jurors shall at the prayer of the defendant inquire concerning the arrears, and the value of the goods distrained; and thereupon the avowant, or he that makes consufance, shall have judgment for such arrears, or so much thereof as the goods distrained amount unto, together with his costs.*

Inquired by the same jury that tries the issue, they doubted if it may be supplied by writ of inquiry, and it being a new case they would advise; but afterwards in Trin. 21 Car. 2. it was resolved after several

several debates that it cannot be supplied by writ of inquiry. Lev. 255. Mich. 20 Car. 2. B. R. Sheape v. Culpepper. — Vent. 40. Ward v. Culpepper, S. C. and the Court held it could not be supplied by writ of inquiry; wherefore he was bid to take his judgment, quod returnum habeat averiorum at the common law. — Sid. 380. pl. 12. S. C. and the Court held that it could not be supplied. — Raym. 170. S. C. ruled, that judgment should not be entered upon this finding, but the avowant may have judgment at the common law if he will, and then the plaintiff is put to a second deliverance.

In a replevin removed by a recordari there was a nonsuit for want of a declaration, whereupon the defendant made a suggestion and took out a writ of inquiry on this statute; the plaintiff moved to set it aside, because the nonsuit happened through the sudden sickness of the person employed to prosecute; per Cur. this new statute having taken away the writ of second deliverance, hath made the plaintiff remediless, unless we help him, and therefore we will endeavour it as far as we can, and ordered that the defendant shew cause why he should not accept of a declaration upon payment of costs. Vent. 64. Hill. 21 & 22 Car. 2. B. R. Playfers v. Sheering.

For more of Avowry in general, see Distress, Perfor, Limitations, Mesne (O) (P) (Q), Replevin, Traverse, and other proper titles.

## Authority.

(A) *What shall be said a good, and what a bad, or void Authority.* Fol. 328.

[1. IF a man signs and seals a lease of ejectment intended, but does not deliver it, and at the same time seals and delivers a letter of attorney, in which he recites, *whereas he by indenture of lease, bearing such a date &c.* (which is true) *hath demised of B. such land, habendum &c.* Now these presents witness, and he makes J. S. his lawful attorney to deliver the said indenture upon the land, as his deed; though according to the proper signification of the words, the lease ought to be taken to be delivered by him, and so this letter of attorney void to deliver it again, for this cannot be an indenture if it was not delivered, nor can it be a demise, as it is recited, if the lease was not delivered; yet all parts of the letter of attorney being laid together, and the intent the parties, and proof being made that the lease was not delivered, but only signed and sealed, it appears that this was only an improper expression of his intent, by calling it an indenture and a demise, for if he had intended that this was an indenture sealed and delivered, this letter of attorney to deliver it upon the land need not have been made. Mich. 24 Car. B. R. between Emery and Coke, per Curiam, scilicet, my brother baron [Bacon] and myself ruled it upon evidence at the bar.]

[This is  
misprinted  
as to the  
Year-book.]

2. A letter of attorney was to make *seisin* to *Isabel secundum formam chartæ*, and afterwards the feoffor razes the word *Isabel* and puts in *Godfrey*; the attorney cannot make livery to her, because it ought to be made to him as it is in the deed now, but not [as it is] in the letter of attorney. Arg. Litt. Rep. 144. cites 25 Aff. 6.

3. If a testator devises land to an infant, he cannot devise that *J. S. shall lease the land in the name of the infant devisee*, and if he does it is void; for it should in law then be the lease of the infant, who cannot make any; and none can authorize any to make leases in the name of another, but of him in whose name the leases ought to be made. Cro. E. 734. pl. 1. Hill. 42 Eliz. B. R. Pigot v. Garnish.

4. A man cannot make an authority, power or warrant *irrevocable*, which by law, and in its own nature, is revocable. 8 Rep. 82. a. Trin. 7 Jac. resolved in Vinyor's Case.

5. A letter of attorney was made to J. S. for *surrendring such a copyhold*, and did not say (for him and in his name); Yelverton J. said, that the letter of attorney is lame for this cause, for otherwise the copyhold might be the copyhold of him that surrendered by virtue of the letter of attorney, and so he should surrender his own copyhold; but Tanfield contra, because he said in the letter of attorney that (he did *constitute and appoint, and in his stead and place put*) which are as full as if he had said (in his name). Browl. 94. Pasch. 5 Jac. in Case of Stamford and Cooks.

2 Roll Rep.  
390. S. C. &  
S. P. held  
accordingly.  
—Godb.  
358. pl. 452.  
S. C.

6. An authority was given to an attorney *ad petendum, recipiendum & recuperandum* money from a debtor. Resolved per Cur. that *ad recuperandum* is sufficient warrant to make an arrest, because it is an act by means whereof he ought to recover. Palm. 394. Mich. 21 Jac. B. R. Randal v. Harvey.

7. Authorities by letter of attorney are either *general or special*, as a letter of attorney may be to sue in omnibus causis motis & movendis, or to defend a particular suit. Sir Philip Sidney when he went to travel gave Sir Thomas Walsingham a letter of attorney to act and *sell all his land, and all his goods and chattles*, and it was held good. 1 Salk. 96. Pasch. 13 W. 3. in Case of Parker v. Kett.

8. Where a man doth any thing *by the express order* of another, it is as good as if done by himself; as where one expressly orders J. S. to *sign a deed*, which J. S. did afterwards sign, this is good as *one determinate act*. But where a deputy doth any thing by virtue of a *general deputation* it must be where a deputy may be made by law, per Cur. 8 Mod. 365. Pasch. 11 Geo. in Case of the King v. Bishop of Chester.

(B) *What shall be a good Execution of an Authority.*

[1. **V**IDE for this Co. Litt. 112. b. 113. and the Irish case of tenures.]

[2. *A. devises lands in tail, and if the donee dies without issue, that it should be sold by his son in law, he then having 5 sons in law, and dies, and after one of the sons in law died in the life of the donee, and after the donee dies without issue; the 4 surviving sons in law may sell it, because they were named generally sons in law, not by particular name, and it may be sold by all, and the words are satisfied by the plural number. Hill 26 Eliz. B. R. between Vincent and Lee, adjudged upon a special verdict. Co. Lit. 113.]*

Cro. E. 26. pl. 5. Lee v. Vincent, S. C. adjudged accordingly. — Mo. 147. pl. 291. S. C. adjudged accordingly. — [418] Le. 285, 286. pl. 387.

Lee's Case, S. C. adjudged accordingly. — 3 Le. 106. pl. 156. S. C. in totidem verbis — S. C. cited by the name of Rowland v. Lee as adjudged. And. 145. in pl. 193. — S. C. cited, D. 177. a. marg. pl. 32. but if they had been named by their several proper names, as A. B. C. D. & E. the survivor could not have sold.

[3. If a judgment be assigned to the King in satisfaction of a debt due to the King, with a proviso that if the barons of the Exchequer, or any two of them revoke it, that it shall be void; and after 3 of the barons revoke it, (there being four) as it seems, this is a good revocation, for if three revoke it, two do it. Co. 5. Hoe 91. [b.] resolved.]

[4. But if the words had been, that if the barons or any two of them jointly or severally revoke it &c. there 3 of them could not revoke it, for this is neither jointly nor severally. Co. 5. Hoe 91.]

If a charter of feoffment be made, and a letter of attorney to

4 or 3 jointly or severally to deliver seisin, two of them cannot make livery; because it is neither by them 4 or 3 jointly, nor any of them severally. Co. Lit. 181. b.

[5. If the King grants a warrant to 4, scilicet, the treasurer, chamberlains, and under-treasurer of the Exchequer, by which the King gives power to them, or any 1 of them, to pay out of the King's treasure the costs and expences of any man who shall be employed in the service of the King, and after two of the said \* four give a warrant for the payment of a certain sum to J. S. this is a good warrant, though neither all four nor one only did it. Dubitatur. Co. 11. Earl of Devon.]

\* Fol. 329.

[6. If a warrant be made to 3 or any one of them conjunctim & divisim, to arrest J. S. upon process, though this be joint and several, yet two of them may execute it, because this is in execution of justice, and therefore shall be more favoured than other things, and perhaps the two may have a better opportunity than the 3 shall have at another time. Mich. 15 Jac. between Lovet and Ludlam adjudged per Curiam; this being moved in arrest of judgment,

3 Bulst. 209 210 Amson v. Walcott, S. C. adjudged accordingly; and Coke Ch. J. said that S. P. was so ad.

judged, 45 Eliz. in a case between the King and Hobbs. Roll. Rep.

406. S. C. and Coke said it had been adjudged good, and Coventry said it had been adjudged good 45 Eliz. in Case of Hobbs v. King. But the judgment in the principal case was given on another point. —Roll. Rep. 299. Arg. cites the Case of Hobbs v. King. 45 Eliz. and the same was agreed to by Coke Ch. J. and Houghton J. —Cro. E. 913. pl. 2. Hill. 25 Eliz. King v. Hobbs, S. P. where the warrant was to four, et cuilibet eorum, held accordingly by Gawdy and Yelverton, but Fenner e contra. —Yelv. 25. S. C. & S. P. accordingly. —Noy. 47. S. C. one against one. —Co. Litt. 181. b. S. P. accordingly, and because execution of justice is pro bono publico. —Roll. Rep. 127, 138. Pasch. 17 Jac. B. R. WHITE v. WILTSHIRE S. P. adjudged accordingly, on a warrant to make execution by fieri facias. —Palm. 52. S. C. and the whole Court held accordingly, and judgment for the defendant; and it was said at the bar, that the same had been adjudged several times, and particularly in C. B. in one Abington's Case. —S. P. in error on an indictment of riot and riot, but nothing said by the Court. Poph. 202. Mich. 2 Car. B. R. Harrison v. Errington. —S. P. accordingly; Hutt. 127. Mich. 11 Car. Lafbrooke's Case.

Upon a *latitat*, the sheriff returned a return to this effect, that by virtue of the writ to him directed, he had directed his warrant to J. S. and J. N. his bailiffs, and that the defendant was in the custody of J. S. and was rescued by the persons mentioned in the return. It was moved to quash this return, because the authority to arrest is by the warrant given to two, and that the defendant was in custody of one only, who had no power to execute the warrant, unless it had been conjunctim & divisim; but per tot. Cur. the return is good upon an old allowed distinction, that where an authority is given to 2 or more, for the administration of justice, any of them may execute it; otherwise of private authority, unless it be conjunctim & divisim. M. S. Rep. Mich. 5 Geo. B. R. Anon.

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\* This is misprinted and should be Pasch. 38. H. 8. pl. 23. —S. C. cited by Gaudy and Yelverton. Yelv. 26. —S. C. cited Cro. J. 553. pl. 17. Mich. 17 Jac. B. R. in Case of Obrian v. Knivan; but a difference was taken between an authority and a commission of direction (as for the election of a bishop in Ireland) to several, which may be well executed though one be removed.

—So of an authority given to three trustees by deed, and one died, the executing thereof by the survivors was held not sufficient. 1 And. c. pl. 10. Mich. 2 & 3 Eliz. Butler v. Grey. —D. 189. pl. 15. S. C. —Bendl. 82. S. C.

† S. C. cited, Arg. 2 Roll. Rep. 257. and the difference there taken is between judicial and ministerial acts, that in the last case executing by 2 may be good, but not in the first case. —S. C. cited 2 Mod. 78.

[7. If a letter of attorney to make a livery of seisin conjunctim & divisim be made to three, and two of them make livery, the third being absent, this is not good, for this is not conjunctim nor divisim. \* 36 H. 8. D. 62. † 27 H. 8 b. Co. 5. Hoe 91.]

[8. But in the said case, if two make the livery, the third being present, and doing and saying nothing, this is good; for it shall be taken to be the act of all, they coming there for that purpose. Dubitatur. D. 36 H. 8. 62.]

Cro. C. 335. 336. pl. 21. S. C. and judgment accordingly. —Jo. 327. 328. pl. 9. S. C. adjudged accordingly; but held that as the power was given on a condition precedent, there ought to be a sufficient averment of the performance; and she ought to set forth how much the debts were, and how much the goods were, &c.

[9. If A. devises lands to B. his wife for life, and devises further that if it appears that there is not sufficient to pay his debts, then B. shall have power to sell so much of the land as will pay the debts; in this case B. may sell but so much of the land as will suffice to pay the debts. Mich. 9 Car. B. R. between Dike and Ricks, adjudged per Curiam, upon a demurrer.]

[10. If

[10. If *cestuy que use* had devised that his wife should sell his land, and made his wife executrix, and died, and the woman took another husband, she might have sold the land to her husband, because she did it in another's right, and the husband should be in by the devisor. 10 H. 7. 20. Co. Litt. 112.]

See tit. Barons and Feme (K).

[11. If land be devised to executors to sell, though one executor refuses, yet the other executors cannot sell to him, because he is party and privy to the last will, and remains executor notwithstanding his refusal. Co. Litt. 113. Tr. 27 H. 8. 6. Ben. Reports.]

Bendl. 12. pl. 18. S. C. —And. 27. pl. 62. S. C. in totidem verbis. —

Kelw. 207. b. pl. 3. S. C. in totidem verbis.

[12. If a man devises lands to B. his wife for life, the remainder to C. in fee, and by a codicil he devises that B. shall have power 6 months before her death to lease it for 6 years; B. takes a second husband, she and her 2d husband may lease it by deed, or without deed, for 6 years; and if they lease it for 6 years, habend. a die datus, yet this is good, \* she being living the next day. P. 13 Car. B. R. between Harris and Graham, adjudged upon a special verdict. Intratur Mich. 11 Car. Rot. 370.]

\* Orig. is (ceo.)

[13. If A. by will in writing devises land to B. for life, and devises further that B. (whom he makes his executor) shall have power to sell the reversion in fee, in case there shall not be sufficient goods to pay his debts, and after dies, and after B. not having sufficient goods, sells the land by bargain and sale, by deed inrolled to J. S. and his heirs, though the estate for life passes by this bargain and sale by the statute of 27 H. 8. of uses and inrolments, but not the reversion in fee by the statutes, because the vendee comes in by force of the devise, and not by the statute, yet it shall pass by this deed inrolled as a sale according to the will, though neither the will nor power are recited in the deed, because B. had no power to sell the fee of the land, but by the will. Mich. 9 Car. B. R. between \* Dike and Rick, per Curiam, agreed upon a demurrer in replevin; and then was cited a case to be adjudged 2 Car. B. R. between † Daniel and Uply, which intratur Hill. 22 Jac. Rot. 720.]

\* Cro. J. 335. 336. pl. 21. S. C. adjudged. —Jo. 327. pl. 9. S. C. adjudged. † Jo. 137. pl. 3. Daniel v. Ubley, S. C. —Noy 80. Daniel v. Upton, S. C. —Lat. 9. 39. 134. S. C. but I [ 420 ] do not observe the S. P. and

same diversity in either of the said books.

[14. If a man devises that his executors shall sell certain lands, and dies, and the executors enter, and make a feoffment of the lands, this is an execution of the will to convey the land to the feoffee; for he is in by the devise. Litt. \* f. 169. Co. Litt. 113.]

Fol. 330.

\* This seems misprinted for (f.) viz.

section. —S. P. though the inheritance shall descend to the heir, and continue in him, until the executors sell. Perk. f. 541.

[15. If a man devises land to his executors to sell, and dies, the executors may sell part of the land at one time, and part at another time, as they can find purchasers. Co. Litt. 113.]

This point is not at 12 Aff. 24. S. P. it is be of an entire thing. Arg.

12 Mod. 356. — As if he be to do 3 things, and he does only one, or part, it is void; per Holt Ch. J. in delivering the opinion of the Court. 12 Mod. 262. Trin. 10 W. 3. in Case of Saunders v. Owen. — As where by the act of 1 W. & M. cap. 21. the Custos Rotulorum &c. is enabled to appoint one able and sufficient person &c. to be clerk of the peace, for so long time as such clerk shall demean himself well in the said office, he must first nominate the clerk; 2dly, he must describe the manner of his execution by himself or sufficient deputy; 3dly he must limit the continuation, quamdju se bene gesserit; so that his saying I appoint J. S. to be clerk of the peace is only one part of his power. Ibid.

16. If a man has authority, and he *does less than his authority*, all is void; as if one has letter of attorney to make livery and seisin to 2, and he makes it to one only, all is void, and he is a disseisor to the feoffor. Arg. Godb. 84. in pl. 96. cites 12 Aff. 24.

17. A. made a simple deed of feoffment, and letter of attorney accordingly, and the attorney delivered the seisin upon condition. This was adjudged a disseisin. Br. Feoffments de &c. pl. 25. cites 12 Aff. 24.

\* [But misa. printed, there not being so many folios there.]

18. A commission issued to inquire whether certain lands were to be seised into the King's hands. The commissioners inquired, and found that they were to be seised, and thereupon they seised them; but all awarded void, because they exceeded their authority, which was not to seise, but to inquire. Arg. Mo. 217. in pl. 355. cites 1 H. 6. fol. \* 10.

S. C. cited Arg. Holt's Rep. 463. pl. 8. Trin. 5 Ann. in the Case of

19. Letter of attorney to make livery and seisin to J. S. chaplain. The attorney cannot deliver seisin to J. S. if he be not chaplain. Arg. Litt. Rep. 144. cites 4 H. 6. 1. [b.]

Therold v. Smith, and agreed by the Court to be good law.

20. If a *capias* be to several coroners, and one executes it, it is void. Godb. 39. cites 34 H. 6.

21. An Act of Parliament ordains that a disseisin made by A. to B. shall be determined in the Chancery before the Chancellor, calling to him a judge to hear and determine it along with him. In this case the *subpoena* against A. ought to be special for A. to appear in the Chancery before the Chancellor and the said judge. By the justices of both benches, this act ought to be pursued strictly; for it derogates from the common law. Jenk. 135. pl. 76.

22. Commission to hear and determine all matters between J. N. and 3 others. They may determine joint matters and several matters between them. Br. Arbitrement, pl. 44. cites 2 R. 3. 18.

Br. Feoffments de &c. pl. 25. cites 12 Aff. 24. and at the

23. So if he have a letter of attorney to make livery of 3 acres, and he makes it of two acres only, it is void for the whole. Arg. Godb. 84. in pl. 96. cites 4 H. 7.

end of the case makes a quere, whether he is not disseisor of the whole. — Ow. 73. Arg. S. P. that he cannot infeoff by parcel, cites 10 H. 7.

[ 421 ] 24. If a letter of attorney be to make a grant in English, and he Godb. 31. makes it in Latin, it is not good. Arg. Litt. Rep. 144. cites 10 p. 427. Arg. S. P. and H. 7. 9. per Keble.



*Wes S. C.* — *S. C.* cited *Arg. Holt's Rep.* 463. and agreed by the Court in the Case of *Thorold v. Smith*, *Trin.* 5 *Ann.* to be good law.

25. If a *letter of attorney misrecites* the date, the person, the estate, or the land in the deed, it is void; per *Walter Ch. B. Litt. Rep.* 146. in *Scacc.*

26. A *commission made to two* cannot be executed by one alone. 2 *Inft.* 380.

A *commission* to 6, 4, or 2, was executed by

3, this was lately adjudged in *Chancery* to be void, and without warrant; cited by *Fenner J. Yelv.* 26. *Mich.* 44 & 45 *Eliz.* — *Noy*, 47. *Fenner* said, he was in this Case in *Chancery*, and cites it as *Shelly's Case*.

27. *J. S. cesty que use* before the statute of 27 *H. 8.* devised that *A. B. and C. his feoffees* should sell his land. *J. S. died. A. died.* It seems that the survivors could not sell, and ruled accordingly. But the reporter says, *quære*, if they had not been named *A. B. and C.* but feoffees only. *D.* 177. a. pl. 32. *Hill.* 2 *Eliz.* *Anon.*

*S. C.* cited *Bridgm.* 114

28. The Lord *Bray* declared the uses of his land to such a woman with whom his son should marry at the nomination and appointment of four of the privy council; one of them died before the son was married. It was held, that the authority of the other three is determined. *Dyer* 190. *Mich* 2 & 3, *Eliz.* *Butler v. Lord Bray.*

29. By a statute made 2 & 3 *P. & M.* cap. 4. authority was given to *Cardinal Poole*, to *dispose, order, employ, and convert* the benefices appropriate to the increase and augmentation of the living of the incumbents; he made a lease for years of a parsonage appropriate. It was holden, that the lease was void; for he had authority but to the intents specified in the statute, and he had not the fee simple given him by any words of the statute. *Mo.* 42. pl. 129. *Trin.* 4 *Eliz.* *Anon.*

*Dal.* 42. pl. 22. *S. C.* in *totidem veris* his.

30. A man devised his land to his wife for life, the remainder to another for his life, and after their deaths he devised that the same lands should be sold by his executors, or the executors of his executors; he died, and one of the executors died intestate. Afterwards the other executor made his executor, and died, and then the wife and he in remainder died. It was the opinion of the justices, that the executors of one executor should not make the sale, for they had authority jointly, and if one of them fail, the other cannot execute the testament. *Mo.* 61. pl. 172. *Pasch.* 6 *Eliz.* *Anon.*

*D.* 219. a. pl. 8. *Mich* 4 & 5, *Eliz.* *Danne v. Annas and Johnson.* *S. P.* held accordingly, and seems to be *S. C.*

31. The King granted a commission under the seal of the Court of Augmentations, to certain persons to assign to the wife of a person attainted, the third part of the lands of the husband. The commissioners assigned her the 3d part of the rent of a house, which the King confirmed, and she accepted; adjudged, that this assignment of dower was not good, because the commissioners had not pursued their authority, for that was to assign lands, and they had assigned rents issuing out of lands, and the

confirmation by the King cannot make that good which was merely void. Dyer 263. Trin. 9 Eliz. Arundel (Lady) v. Pembroke (Earl).

32. A. devised lands to his wife for life, and that *after the death of his wife the lands should be sold*, and the money thereof coming to be distributed to three of his blood, and *made his wife and another executors, and died*; the executors proved the will; the other executor died; the wife sold the lands, and held good, and that the lands should be sold in the life of the wife, otherwise they could never be sold. 2 Le. 220. pl. 276. Pasch. 16 Eliz. B. R. Anon.

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S. C. cited  
Arg. 2 Jo.  
85.

33. A man *devised all his manors, lands &c. to his sister, except one manor, which I appoint to pay my debts, and made two executors by name, and died*; the one executor died; the other may sell and pay the debts, for so was the intention of the testator. Dy. 371. b. pl. 3. Mich. 22 & 23 Eliz. Anon.

34. Devise of land to A. for life, remainder to B. in tail, and for default of issue *to be sold by the executors of devisor*. He made J. S. and W. R. executors, and died. J. S. died; B. died without issue; A. died. W. R. sold the land. The opinion of the Court was, that the sale was void. And. 145. pl. 193. Pasch. 28 Eliz. Lock. v. Loggin.

Le. 60. pl.  
78. S. C.  
says, that it  
was adjudged,  
that the condition  
[but it seems  
to be mis-  
printed, and  
that the word (con-  
dition)  
should be  
[vendition]  
for the man-  
ner of it is  
good. — Godb. 77. pl. 92. S. C. argued, but adjournatur.

35. A. seised of the manor of D. *devised the same to J. S. and 3 others, and their heirs*, to the intent the devisees should *sell it for the best profit*, and convert the money *to the performance of his will, and makes them his executors*, and dies, *one of them refuses to meddle*, the other 3 *sell it in the life of the 4th*. It was adjudged, that the sale was good by the three, either by the common law, or by the statute of 21 H. 8. and by making them his executors it is as much as if he had devised, that his executors should sell, and in such case the sale by 3 without the 4th is good, but the statute makes it clear. Cro. E. 80. pl. 43. Mich. 29 & 30 Eliz. B. R. Bonifaut v. Greenfield.

Letter of  
attorney to  
several to  
give livery  
of seisin; if  
one makes livery alone, it is void. Arg. Godb. 39. cites 19 H. 8. and 27 H. 8.

36. Where an authority is given *to several by one deed*, there all *ought to join*; *contrary* where the authority is given *by will*. Arg. Le. 60. in pl. 78.

~~When a man~~

37. A *commission* was directed to 8 persons by name, and 7 of them *only made the return*. It was adjudged, that the authority given to these 8 persons was joint, and not several, and ought strictly to be pursued. Bullst. 105. Hill. 8 Jac. Anon.

For he held  
it good law,  
if a man  
make a letter

38. An authority may be *well executed for part*, and void for the other part; by Hutton J. Arg. Ley. 79. Pasch. 1 Car.

of attorney to make livery in White Acre, and the attorney makes a livery in White Acre and Black Acre, this is good for White Acre, and void for Black Acre, and this book is not crossed unless by 4 H.

4 H. 7. which he says is to be intended where the authority, which was to make livery in one acre generally without naming of which, in which case also the lessor has many acres, the charter itself is void. Ibid.

39. One devised lands to his wife for life, and afterwards orders the same to be sold by his executors, and the moneys thereof coming to be divided amongst his nephews, and makes A. and B. his executors, and died. A. died. It was certified by Jones, Berkley, and Crooke J. on a reference out of Chancery, that the executors had not an interest by the devise, but an authority only, and that the surviving executor, notwithstanding the death of his companion, might sell. Cro. C. 382. pl. 10. Mich. 10 Car. Houel v. Barnes.

Jo. 352. pl. 3. Barnes's Case, S. C. certified accordingly.

40. Devise to the wife to give to my children and grandchildren, according to their demerits. Ld. Chancellor said the children are not to come in by the will immediately, but by the act of the devisee, and she is to give or distribute according to their demerits, therefore she is judge; and dismissed the bill as to that. Chan. Cases, 309. Hill. 30 & 31 Car. 2. Civil v. Rich.

2 Chan. Rep. 141. S. C.

41. A person having only an authority, cannot annex a power of revocation when he executes it. Vern. 355. pl. 352. Hill. 1 & 2 Jac. 2. in the Case of Wall v. Thurborn.

42. An authority once well executed cannot be executed de novo; but where it is not well executed, it may be acted again; as where executors by devise have a bare power to sell land, though they make a feoffment, yet they may sell afterwards; per Ventris J. 5 Mod. 457. 2 W. & M. in C. B. Arg. in Case of Tippet v. Eyres.

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S. P. seems admitted by Rokeby J. Ibid.— Ibid. 255. S. P. by Powell J. As when the

lessee for years will not consent to the first livery, the same attorney may make livery again; and cited Palm. 280. Molyneux v. Tolin.—And so if lands are given to J. S. the remainder to such a person as he shall appoint, and he appoints a monk, he may notwithstanding appoint again.

So if a letter of attorney be to deliver seisin, and the attorney delivers seisin within the view, which is no good execution of his authority, yet sure that does not hinder him from delivering seisin upon the land; per Pollexfen Ch. J. 2 Vent. 115. Hill. 1 & 2 W. & M. in C. B.

An habere fac. possess. was executed by the sheriff in delivering a house; and after it was over, it was discovered that a person was bid in a room of the house, whereupon he was turned out, and the sheriff delivered execution again; per Pollexfen Ch. J. 2 Vent. 115. Hill. 1 & 2 W. & M. in C. B. cites Palm. 289. that it was resolved to be well.

43. Authority to chuse an umpire. They chuse A. who refuses; then they chose B. A good execution, by Pollexfen Ch. J. but the other 3 contra, and judgment for the plaintiff. 5 Mod. 4. 58. 2 W. & M. C. B. Tippet v. Eyre.

When they have chosen one generally, they cannot alter chuse another.

ther, because they have executed their authority; but if they chuse him conditionally that he will accept it, and he refuses, they may chuse another, because they never executed their authority. 12 Mod. 120. Pasch. 9 W. 3. Reynolds v. Grey.—See ut. Arbitrement (P) per tot.

44. All authorities, whether judicial or ministerial, or private by one person to another, must be pursued, for when one has no right to do a thing but by a derivative power, he must shew he has pursued his power, and especially if the thing to be done be intire, and more is done than warranted by the power, all is void, cites 22 E. 4. 13. a. If Court of Common Pleas holds plea for murder, it

is merely void, cites 19 Ed. 4. 8. Kelway 106. Dy. 135. b. [So] citation in *Admiralty*, for cause arising within the body of a county, [and] *suit in Marshalsea*, where neither party is of the household, cites Sir J. Davis 46, 47. 10 Co. Case of Marshalsea. March 8. 10. And as to private authorities, he quoted 1 Inst. 303. 49, &c. Cro. Ca. 335. 1 Le. 35. 8 Co. 119. Plow. 393. Hard. 481. If *commissioners of excise* act beyond their commission, they cease to be officers *pro tunc*; per Hall Serj. Arg. 12 Mod. 364. Pasch. 12 W. 3. in Case of Pullen v. Purbeck.

45. An owner of lottery tickets gave a goldsmith power to receive money for the tickets. The goldsmith cannot, by virtue of this, exchange those tickets for others, and if he does, the property is not altered. 1 Salk. 283. pl. 14. Hill. 12 W. 3. coram Holt Ch. J. at Guildhall, Ford v. Hoskins.

It seems that though he was capable while a 2d son, yet upon commencing eldest, he became incapacitated; and Ld. Keeper said that he had,

46. By a marriage-settlement 4000l. was to be raised for younger children's portions, in such proportions as A. should appoint. A. appointed 2600l. to his 2d son. Afterwards A.'s eldest son dies, by which the 2d son became heir apparent, and A. makes another appointment of the 2600l. to one of his daughters; and decreed good, the other being made on a tacit condition of not becoming the eldest son; per Wright K. 2 Vern. 528. pl. 476. Hill. 1705. Chadwick v. Doleman.

The point propounded by Holt Ch. J. for the new trial, and agreed to, was, whether the

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servant had power to receive a bill and give a

receipt; and Holt said, that in this case the receipt of a servant, that has power, is the receipt of the master. 11 Mod. 88. pl. 7. S. C.

47. Where a servant has an authority to receive money, he cannot receive any thing else in lieu thereof; and in the principal case, a banker's note being taken by a servant, the question was if the master should be bound by it, the banker breaking presently after; and Powell J. insisting that he did not take this to be matter of law, but matter only of evidence, whether this be good payment, Holt and the Court agreed, and so a new trial was awarded. Holt's Rep. 464, 465. Trin. 5 Ann. in Case of Thorold v. Smith.

48. One coroner gave another coroner authority generally to put his name to all writs that came to him directed to the coroners. He put the other coroner's name to a warrant, by which J. S. was oppressed, and the coroners were taken into custody. Per Cur. this general authority must be intended to do all legal acts, so that if the other coroner to whom it was given abuses it, such abuser cannot be a contempt by that coroner who gave the power, and so he was discharged. 8 Mod. 192. Mich. 10 Geo. 1. Ld. Conningby v. Stead.

(C) What *Authority is well pursued*, and what not.  
*Authority coupled with a Confidence.*

[1. *A* N executor having authority to sell, cannot sell by attorney,  
Co. 9. 77. b. *Combes's Case*.]

(D) *Authority General, as absolute Owner of the Land.*

[1. *C* ESTY *que use might have made a feoffment*, per 1 Rich. 3. This seems  
by attorney. Co. 9. Comb. 75. b. D. 11.] very much mistaken in  
the print-  
ing, and  
should have

[2. El. 283. And there a judgment was cited 25 H. 8. accord-  
ingly. 9 H. 7. 26. per Curiam e contra.]  
been continued on in the same plea, the beginning of what is now pl. 2. belonging to the end of pl. 1.  
and should be thus, viz. Co. 9. 75. b. *Combes's Case*, [cites] D. 11 Eliz. 283. and there a judgment  
was cited in 25 H. 8. accordingly, against the opinion of some justices in \* 9 H. 7. 24 [26. a.]

\* Br. Feoffment to Uses, pl. 28. cites S. C. — S. C. cited Arg. Godb. 314.

(D. 2) Double. Where a Man has 2 Authorities  
to act by, and he does an Act within both Au-  
thorities, by which of the 2 such Act shall be  
said done.

1. *W* HEN a man has 2 authorities to do an act, he cannot use both simul & semel; but if he executes the one, there the other is void; per Brudnell and Keeble. Br. Office devant  
&c. pl. 35. cites 9 H. 7. 8. *As where justices of gaol deli- very have power as justices of*

*peace*, if they make their default as justices of gaol delivery, the other power is void. Br. Com-  
missions, pl. 17. cites 9 H. 7. 9. per Brudnell and Keeble.

*And justices of gaol delivery, and of oyer and terminer, may inquire in both powers all at one time, and make their record as justices in the one form and the other all at one time, and well; per Butler, Hobert, Bead, Wood, and Fisher. Ibid.*

(E) *Authority particular as absolute Owner of the* [ 425 ]  
*Land.*

[1. *L* ESSEE for life hath power to make leases rendring the ancient rent, he cannot make them by letter of attorney. 2 Roll. Rep. 391. Arg. cites S. C. that a thing which is re-  
Co. 9. Comb. 76.]

strained to the person cannot be done by attorney. — S. C. cited Palm. 436. by Jones J. and agreed by him, that he cannot make the lease by attorney; For it is not a lease of the land, but a declaration of the first use, and the fee comes in by the original agreement upon the first feoffment, as it is in *Whitlock's Case*, 8 Rep. and it is personal to the owner of the land in such case; for it refers to the first feoffment.

2. A tenant in capite obtains the King's licence to *infeoff two* of the manor of Dale, upon condition to give it back to A. in tail, the remainder to B. in fee; the feoffment was made to two accordingly; A, afterwards dies, his heir being within age; afterwards the gift was made to the heir of the body of A. the remainder ut supra. Resolved, that this licence doth not extend to give this land to the heir of the body of A. but a new licence is necessary. Jenk. 16. pl. 29.

(F) What Authority is well executed. What not. Executed in the Name of him who gave the Authority.

Godb.

389. Arg.

cites S. C.

If surveyors

have power

to make leases, and they make leases in their own names, it is not good; but they ought to be made in his name that gave the power. Godb. 389. Arg. cites 3 Mar. D. 132. [Greenefield v. Stretch.]

[1. WHERE a man hath authority to do an act, he ought to do it in the name of him who gave the authority. Co. 9. Comb. 76. b.]

Sir Francis

Walsingham

by letter of

attorney

from Sir Philip Sidney, made lease in his own name to Sir Richard Martin, and they were ruled in Chancery to be void, and also in evidence at a trial in B. R. Mo. 818. in pl. 1106. cites 4 Jac. in Canc. the Earl of Clansrichard's Case.

[2. So he that hath authority to make a lease for me; so he that hath authority to surrender for me a copyhold.]

[3. But if executors have authority to sell land, they may sell in their own name for necessity, for he that gave the authority is dead. 9 Rep. 77. Combe's Case.]

Dal. 71. pl.

46. S. C. in

totidem ver-

bis.

4. The King by his letters patents gave authority to the surveyor to make leases of certain lands for life, reserving the ancient rent, who made leases in this manner, viz. *this indenture made between our Lord the King of one part, and J. S. of the other part, witnesseth, that the King hath demised &c.* and at the end of the lease it was *in witness, whereof the surveyor hath put his hand and seal*; this lease was adjudged void; for though a man may have a larger authority by the words in a grant than the law generally gives him, yet he must pursue that authority which he hath, and he ought not to have put his own seal to the lease, but the seal of the King; for it cannot be the lease of the King without his seal, and it should have been *Dominus Rex per A. B. sigillum suum apposuit.* Mo. 70. pl. 191. Trin. 6 Eliz. Anon.

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5. The plaintiff having obtained a decree in Chancery for 1000l. gave a letter of attorney to his son to compound the suit; the defendant procured the plaintiff's son to give him a release, upon payment of 100 marks in hand, and the other 100 marks at a certain day to come. All this was done; but the son gave the release

*release in his own name, and not in the name of his father, and for that reason the Court awarded the release to be void. Mo. 818. pl. 1106. Hill. 9 Jac. in Chancery, Dabridgecourt v. Ashley.*

6. A feoffment with a *letter of attorney to the wife* to make livery is good, but then the wife must make the livery in the name of her husband. Arg. Godb. 389. cites Perk. 196. 199.

(G) What shall be a *good Execution of an Authority mixt with an Interest.*

[1. IF the lord gives licence to a copyholder for life, to lease the copyhold for 5 years, the copyholder may lease it for 3 years, for this is comprehended within the licence, in as much as he hath given him licence to lease for more years. Mich. 15 Jac. B. R. between *Woolridge and Bambridge* adjudged upon a special verdict.]

Cro. J. 436. pl. 7. Worledge v. Benbury, S. C. adjudged accordingly. — S. P. held accordingly, and that

such lease is good. Cro. E. 535. pl. 68. Mich. 38 & 39 Eliz. in the Exchequer, Goodwin v. Longhurst.

[2. If the lord gives licence to a copyholder for life, to lease the copyhold for 5 years, if the copyholder *tam diu viveret*, and he leases it for five years generally, without a limitation *si tam diu* (\*) *viveret*, yet this is a good pursuance of the licence, and so a good performance, for the lease is determined by his death, by a limitation in law, and therefore as much is implied by law as if he had made an actual limitation. Mich. 15 Jac. B. R. between \* *Woolridge and Bambridge*, adjudged upon a special verdict. H. 38 El. B. between *Hatt and Arrowsmith* adjudged.]

\* Cro. J. 436. pl. 7. Worledge v. Benbury, S. C. adjudged accordingly; but if the lease had been with a limitation,

that if J. S. had lived so long, that peradventure had been material. — [Cro. E. 461. (bis) pl. 8. Haddon v. Arrowsmith, S. C. adjudged. — Poph. 105. Hall v. Arrowsmith, S. C. & S. P. agreed by the whole Court; but in the principal case, if the copyholder had had an estate in fee by copy, it had been a forfeiture of his estate to make an absolute lease; because in that case he does more than he was licensed to do. — Ow. 72, 73. S. C. adjudged.]

3. Licence to *impark* 200 acres, he cannot *impark* 100 only. Arg. Ow. 73. cites 10 H. 7.

4. If the King licenses A. to alien his manor of D. and he aliens it, excepting one acre, the licence will not serve. Arg. Bridgm. 114. cites \* 23 H. 8. 6. Patent 76

\* But there is no such year, nor any such title as patent in Fitzh. — See 30 E. 3. 17. b. 18. a.

5. There is a difference between a bare authority or power, and a power joined with an interest. In the first case, if the bare power is exceeded in the act done, it is all void, but in the other case it is good for so much as is within the power, and void for the rest only. Jenk 201. pl. 20. 215. pl. 57.

As if the King licenses his tenant in capite to alien 20 acres, he may alien 10 acres;

acres; but in case of a nude power, as a power of attorney to make livery of two acres, if the attorney makes livery of one it is void. Jenk. 215. pl. 57. cites 12 Aff. pl. 24. 8 Co. 84. Sir Richard Pexhall's Case.

6. If the King licenses to alien two parts of a manor held in capite, and he aliens all, he has not pursued his licence; but when act of parliament authorizes the owner of land in capite to charge two parts which he could not do at common law, if he charges all the land, it is merely void as to the 3d part, and therefore he has well pursued the authority which the statute has given him to charge the two parts. 8 Rep. 85. Mich. 6 Jac.

7. So if A. has the moiety of the manor of D. known by the name of D. and the King licenses him to alien the moiety of the manor, and he aliens the manor, he has pursued the licence; for in truth nothing but the moiety passes. 8 Rep. 85. Mich. 6 Jac.

8. Sir Thomas Travell and dame Frances his wife, by indenture bearing date the 18th day of Jan. 1698, did covenant to levy a fine of several manors &c. being the estate of inheritance of the said dame F. T. of the yearly value of about 1200l. the uses of which fine were declared to be to J. Y. and T. N. and the survivor of them, and the executors, administrators, and assigns of such survivor for 1000 years, in trust to raise 2500l. for the benefit of Sir T. T. and after the determination of that estate to the use of Sir T. T. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the said dame F. during her life without impeachment of waste, with remainder to trustees to preserve contingent remainders, remainder to the issue of such marriage, remainder to the issue of the said dame F. by any after taken husband, remainder in default of such issue to the said Sir T. T. and his heirs for ever; in which said deed there are 2 several provisos in the words following; provided also further, and it is the further intent and meaning hereof, and of the parties hereto, that in case the said dame F. should happen to depart this life in the life-time of the said Sir T. T. and that there shall be no issue of her body by the said Sir T. T. lawfully begotten, or to be begotten, at the time of such decease of her the said dame F. T. that then and in that case it shall and may be lawful to and for the said dame F. T. at any time or times during her natural life, by any deed or deeds in writing, or by her last will and testament in writing, or any writing purporting her last will and testament, the same to be respectively attested by 3 or more credible witnesses, to charge all and every the said manors &c. and premisses, or any part or parts thereof, with any sum or sums of money not exceeding in the whole the sum of 1000l. to be paid to such person and persons, and at such days and times, and in such manner and sort as the said dame F. shall by such deed or deeds, writing or writings, to be attested as aforesaid, from time to time direct and appoint, and by the same deed or deeds, writing or writings, for that purpose to limit or appoint any term or terms, or number of years of and



In the said manors &c. and premisses, or any part or parts thereof, to any person or persons whatsoever, nevertheless redeemable, and to become void on payment of such sum and sums of money as shall be thereon charged or appointed, not exceeding in the whole the sum of 1000l. so as such sum or sums of money so to be appointed as aforesaid, be not to be paid or payable till the end of 6 calendar months next after the decease of dame Ann Hodgson, widow relict of Sir Thomas Hodgson, any thing herein contained to the contrary thereof in any wise notwithstanding; provided also further, and the further intent and meaning hereof, and of the parties hereunto is, that if the said Sir T. T. shall happen to depart this life, and that the said dame F. T. shall him survive, and that there shall be no issue of the body of the said dame F. by the said Sir T. T. lawfully begotten or to be begotten, living at the time of the decease of her the said dame F. that then and in that case it shall and may be lawful to and for the said dame F. at any time or times during her life, by any deed or deeds in writing, or by her last will and testament in writing, or any writing purporting her last will and testament, the same to be respectively attested by 3 or more credible witnesses, to charge all and every the said manors &c. and premisses, or any part or parts thereof, with any sum or sums of money not exceeding in the whole the sum of 2000l. to be paid to such person or persons, and at such days and times, and in such manner and sort as the said dame F. shall by such deed or deeds, or writing or writings, to be attested as aforesaid, from time to time direct or appoint; and for that purpose by the same deed or deeds, writing or writings, to limit or appoint any term or terms, or number of years of and in the said manors &c. and premisses, or any part or parts thereof, to any person or persons whatsoever, nevertheless redeemable, and to become void on payment of such sum and sums of money as shall be thereon charged or appointed, not exceeding in the whole the sum of 2000l. so as such sum or sums of money so to be appointed or limited by virtue of this present proviso, be not to be paid or payable till the end of 6 calendar months next after the decease of the said dame A. H. any thing herein contained to the contrary notwithstanding." A fine was levied pursuant to the said deed, and by indenture bearing date the 17th day of July 1703, and made between the said Lady T. of the one part, and Thomas Northmore, Esq; of the other part, reciting the said deed of covenant of the 18th day of Jan. 1698, and the said 2 respective powers for Lady T. to charge the said estate with 1000. in case she died before Sir T. T. and with 2000l in case she survived him, herein mentioned; and in consideration of 150l. the said dame F. T. pursuant to the 2 several provisos or conditions before herein recited, and according to the purport, true intent and meaning thereof, did thereby charge all and every the said manors &c. and premisses, in manner and form following, (to wit) That in case the said dame F. T. should happen to de-

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part

part this life in the life-time of the said Sir T. T. and there should be no issue of her body by the said Sir T. T. lawfully begotten, or to be begotten, living at the time of such decease of her the said dame F. T. then and in that case the said dame F. T. did thereby charge all and every the said manors &c. and premisses, with the sum of 1000l. and she did thereby direct and appoint the said 1000l. to be paid to the said T. N. or his assigns in manner following, (to wit) 500l. parcel thereof, on the 1st day after the end of 6 calendar months next after the decease of dame A. H. widow and relict of Sir T. H. and 500l. residue of the said 1000l. on the day next following the said 1st day, both which payments to be made at or in the Guildhall of the city of Exeter, between the hours of 2 and 6 of the clock in the afternoon of the same respective days, and she the said dame F. T. did for that purpose thereby limit and appoint the term of 2000 years of and in the said manors &c. and premisses of the said T. N. and his executors administrators and assigns, the said term to commence and begin immediately from and after such the death of the said dame F. T. nevertheless redeemable and to become void on payment of the said 1000l. in manner as aforesaid; and if the said Sir T. T. should happen to depart this life, and that the said dame F. T. should him survive, and that there should be no issue of the body of the said dame F. T. by the said Sir T. T. lawfully begotten, or to be begotten, living at the time of the decease of her the said dame F. T. that then and in that case she the said dame F. T. did thereby charge all and every the said manors &c. and premisses with the sum of 2000l. and she did thereby direct and appoint the said 2000l. to be paid to the said T. N. or his assigns in manner following, (to wit) 1000l. parcel thereof, on the 1st day after the end of 6 calendar months next after the decease of the said dame A. H. and 1000l. residue of the said 2000l. on the day next following the said 1st day, both which last mentioned payments to be made at or in the Guildhall of the city of Exeter, between the hours of 2 & 6 of the clock in the afternoon of the same respective days; and the said dame F. T. did for that purpose thereby limit and appoint the term of 2000 years of and in the said manors &c. and premisses to the said T. N. and his executors, administrators and assigns, the said last mentioned term to commence and begin immediately from and after the death of the said Sir T. T. nevertheless redeemable and to become void on payment of the said 2000l. in manner as aforesaid, which said deed was executed by the Lady T. and attested by 6 credible witnesses. The said dame A. H. departed this life several years ago, and in the life-time of the said Sir T. T. and the said Sir T. T. died the 19th day of Feb. 1723; after whose death the said Lady T. brought her bill in Chancery against W. N. Esq. heir at law and executor of the said T. N. to be relieved against the assignment of her interest in the said 2 powers, offering to pay the said 150l. and interest to this time. The said W. N. likewise brought his cross bill against the

Lady

**Lady T.** to establish the said assignment, and to have the benefit of it as to the said 2000l. Upon hearing of which causes before the Right Hon. the Ld. Chancellor on the 3d day of Feb. last, his Lordship was pleased to direct as to the said N.'s demands of 2000l. by virtue of the said deed of the 17th July 1703, that a case should be made on the said deeds of the 18th Jan. 1698, and of the 17th July 1703, and that the same should be laid before the Judges of the Court of King's Bench for their opinion thereon, upon these questions :

Qu? 1st, Whether the deed of the 17th July 1703, be a good execution of the power by the defendant the Lady T. to raise the said 2000l.

Qu? 2dly, Supposing it to be a good execution, then when the said 2000l. is to be raised?

We have considered of the above written case, and are of opinion that the deed of the 17th of July 1703, is a good execution of the power by the defendant the Lady T. to raise the sum of 2000l. therein mentioned, and that the same ought to be raised upon the death of Sir T. T. therein named.

R. Raymond,      Ja. Reynolds,  
F. Page,              E. Probyn.

MS. Rep. Sclater v. Travell.

9. Appeal from a dismissal at the Rolls upon this case; Serjeant Maynard by his will devised several manors, messuages &c. to trustees, and inter alia, the manor of Beer in the county of Devon, to the use of his grand-child Mary Maynard (since Countess of Stamford) for life, with remainder to Lady Hobart for life, with remainder to her first son &c. with remainder over, with a power in the will in the words following; scilicet, my will is that my grand-child M: M. when she by virtue of any clause in this my will, or the meaning thereof shall be or ought to be in the possession of the manor of Beer, and afterwards every son of her or their sons being in possession thereof, and of the age of 21 years, and entitled to the said manor of Beer, be impowered and may lease all or any the tenements thereof for 1, 2, 3, or 4 lives or years so determinable in possession, reversion, remainder, or expectancy, and under the new rents now reserved, and the like agreements and covenants as in the leases now in being, and by the present tenants thereof respectively to be performed and kept, so as all leases to be made with other estates then formerly leased, then in being, exceed not 4 lives, or determinable by death of 4 persons at most in one tenement at one time. Then follows this clause: Item, my will is that T. G. and every other agent in his place appointed as is herein after mentioned, and every other person, to whom the premises shall come into possession, may then lease the same or any part thereof at rack or utmost reasonable rent, and such other agreements for reparations and against waste as they can reasonably agree upon, such lease not to exceed the term of 7 years.

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This lease was afterwards confirmed by a private act of parliament 5 & 6 W. & M. which recites the will verbatim, and confirms it, and likewise creates a term of 1000 years to raise money to pay off incumbrances; afterwards by decree in this Court affirmed in Dom. Proc. wherein Sir J. H. (then an infant) was plaintiff, a settlement was directed to be made pursuant to the will, and a settlement was made by the trustees, but there was a small variance in the words of the power of leasing in the settlements from those in the will (viz.) instead of the words (*under the new rents now reserved &c.*) as in the will, the settlement was (*so as the rents now reserved &c.*) and the restriction comes under the words *so as &c.* The plaintiff claiming under a lease for 3 lives by the Countess of S. for a valuable consideration, by virtue of this power the Barton of Beer, part of the manor of Beer, which was out upon a lease for lives at the time of Serjeant Maynard's purchase, but the lives happened to drop before the Serjeant made his will, and was in hand at the time of his death. Plaintiff brings a bill in this Court to be relieved against a recovery in ejectment by defendant M. to whom the term of 1000 years was assigned, for securing a sum of money lent by him to the trustees, and that the plaintiff might redeem the mortgage, or that the mortgage term should not be set up against him at law to defeat his lease, but that he might be at liberty to try the validity of his lease at law, against the remainder-man Sir J. H. The bill was dismissed at the Rolls for defect of title in the plaintiff, the Master of the Rolls being of opinion, that the lease was not warranted by the power, and therefore determined with the estate for the life of the lessor.

It was argued for the plaintiff that the Barton of Beer was within the power in the will and in the settlement, and that the lease to the plaintiff was a good lease pursuant to the power; that though the power in the will and the power in the settlement varied in words, yet the sense was the same, and no material difference between them; that the will was executory, the devise being to trustees, who were to convey according to the directions in the will; that this settlement was made pursuant to the decree in which Sir J. H. was a plaintiff, and though he was then an infant, yet being a plaintiff he is bound by the decree, and no day given him to shew cause against it; that in his answer to the present bill he does admit that the settlement was made pursuant to the will, act of parliament, and decree of this Court, and therefore he is bound and concluded by the settlement, and cannot now take exception to it; then taking the power as in the settlement, the lease is good; and \* CUMBERFORD'S CASE, 2 Roll. Abr. 262. is an authority directly, the restriction the same in both cases, and coming under the words *so as &c.* That this case of Cumberford's was held to be law in the Case of Walker and Wakeman. 1 Vent. 294. 2 Lev. 150. the power of leasing being generally of all or any tenements of the manor of Beer, and the restrictive clause under the (*So as*) shall be applied only

\* See tit.  
Powers, pl.  
75.

to the rents then reserved, and not the lands, and this Case of Cumberford was cited and allowed by Holt Ch. J. in the Case of Loveday and Winter, 5 Mod. 378.

That the subsequent clause which impowers B. the agent or steward, to make leases for 7 years of the premises, does not alter the case; for this power is proper to be given for the lands which never were in lease, and also for the lands usually let, till they could get a new tenant to take a lease upon a fine, according to the custom and usage of the country; that the mortgage term created by the act of parliament, could not destroy or suspend the power, for that would make the act of parliament absurd, which confirms this power, according to the will, to the tenant for life, and at the same time creates a term of 1000 years, to suspend the power of leasing till that term should expire; besides a mortgage in a court of equity is considered only as a security for money, and does not disturb the possession or enjoyment of the mortgagor; that the relief prayed by the bill is very proper either to redeem the mortgage, or so far to set it aside that it should not be made use of at law to overthrow the lease, for which the plaintiff paid a full and valuable consideration &c. [ 431 ]

For the defendants it was insisted that powers of making leases ought to be construed strictly, for they enlarge the particular estate in prejudice of those in remainder, and this rule was the principal foundation of the resolution in the Case of \* ORBY v. MOHUN, tempore Cowper C. Serjeant M. had two sorts of estates, one sort let out upon lives according to the custom of the west country, another sort of estate of lands in hand or let at rack rent, and he has by his will provided for both these sorts of estates by the two different powers in the will, the power of leasing for lives for the first sort of estates, the other power for leasing for 7 years at a rack rent for the other sort of estates. This case ought to be determined upon the words in the will, and not upon the words in the settlement, which vary from them; for the will is confirmed by act of parliament, and the settlement was decreed to be made according to the will, and this Court will not set up the settlement against the will, act of parliament, and decree of this Court.

\* BAGOT AND OUGHTON, tempore Cowper C. power to lease all or any of the premises in the indenture and fine comprised now in lease, and this power does not extend to any lands not then in lease, and Lady † Baltinglass's Case Vaugh. 28. cited as a case in point &c.

\* See tit. Mortgage (K) pl. 1. and the notes there.

\* See tit. Powers (A. 4) pl. 1. in the notes there.  
† This is the Case of Tristram v.

Roper, Lady Baltinglass, widow; and see tit. Powers, (A) pl. 12, 13. in the notes there; and see ibid. (A. 2) pl. 1. and see 2 Jo. 27. to 38. S. C.

King C. was assisted by Raymond Ch. J. Denton J. and Comyns Baron. Raymond Ch. J. said, my brothers agree with me in opinion, and we are all of opinion that the lease made to the plaintiff is not warranted by the power.

It is very difficult to make a difference in reason between *the power in the settlement and the power in the will*, the words may vary but the sense is the same. This power is in prejudice of the remainder man, and increases the interest of the particular estate, and therefore to be construed strictly; but supposing there be a difference, I think this power ought to be taken upon the foot of the will, and not upon the settlement; the power in the will is all one clause, and must be construed together, and the Case of *TRISTRAM v. VISCOUNTESS BALTINGLASS*, Vaugh. 28. is a case in point; so is the Case of *BAGGOT v. OUGHTON*, according to the opinion of the Court of B. R. to whom the Case was referred by Cowper C. The settlement recites the will, the act of parliament, and the decree, and if the deed does make any difference it must be contrary to the will, act of parliament, and the decree; but it was said the defendant Sir J. H. does admit the settlement by his answer, and therefore is concluded by it; but that sounds harsh in a court of equity, and where the whole state of the case appears upon the record, the admission of the party is not an estoppel at law. As to *CUMBERFORD'S CASE* Hale Ch. J. said, if it had been *res integra*, he should have been of another opinion. 2 Lev. 150. *WALKER v. WAKEMAN*, and that judgment is not founded upon the authority of *Cumberford's Case*. So in the Case of *WINTER AND LOVEDAY*, 5 Mod. 378. *Cumberford's Case* is cited, but no great stress laid upon it; but if that case be law, it should not be carried one step further.

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King C. said, that it does not appear to the Court that the plaintiff has any title, and therefore it is not proper for this Court to remove the mortgage out of the way, to enable the plaintiff to try the validity of his lease at law; equity will not set up the settlement in opposition to the will. I think there is *no material difference* between the power in the will, and the power in the settlement; the sense is the same. The word *tenement* in the will, in legal understanding, has a general signification, but in common understanding means lands holden by tenants, and this appears to be the meaning of the testator by the subsequent power to demise the premises for 7 years at a rack rent. Vaugh. 28. is a case in point; and since the Court is of opinion that the lease is not good, it is not proper for the Court to interpose in favour of the plaintiff to set this mortgage out of the way, in order to trouble the remainder man with a suit at law, therefore the decree of dismissal at the Rolls must be affirmed. MS. Rep. Pasch. 13 Geo. in Canc. *Foot v. Marriot*, Sir John Hobart and al.

10. H. T. tenant for life, with power to make leases for years determinable on 3 lives &c. Remainder to T. T. his son for life, with like power to make leases after the death of H. H. and T. T. join in a mortgage to C. in fee, with a covenant by C. for himself, his heirs, executors, and administrators, to ratify and confirm all leases made by H. and T. under certain restrictions, not perfectly agreeable with the power in the marriage-settlement,

particularly the leases were to be for money really, and bona fide paid &c.

H. and T. made 2 leases, and then C. assigns his mortgage to the defendant E. and after the assignment H. and T. make 2 other leases. The plaintiff claims all the 4 leases, and brings his bill to establish them.

For the defendant it was insisted that the leases were void; 1st, they could not be good under the power in the marriage-settlement, because that being a power coupled with the interest or estate of H. tenant for life, and he and T. having departed with all their estate by the mortgage, the power was gone &c.

2dly, The defendant had no notice of the 2 first leases at the time of taking his assignment from C. nor were the leases pursuant to the covenant by C. to ratify &c. And 3dly, As to the leases since the assignment, the covenant by C. being only for himself, his heirs, executors and administrators, and not assigns, this covenant could not bind the defendant as assignee, being collateral to the land, and the estate and interest assigned; and T. joined in the assignment to defendant, and no power or new covenant reserved as in the first mortgage, and therefore the leases made after by T. are void.

It was objected that the defendant does not deny notice of the leases when he took the assignment; but it was answered that defendant says he knew nothing of them, and the plaintiffs have not charged notice particularly, and possession never went with the leases, so as to give or imply notice to the defendant.

The Master of the Rolls said, that one of the leases claimed by the plaintiff is only an agreement that the covenantor should engage, whereas the covenant is to make good leases to be made by the mortgagee, and not agreements for leases &c.

Ld. Chancellor said, that as to the 2 leases before the assignment to the defendant, the question is, what influence the marriage-settlement and the covenant of the mortgagee should have on those 2 leases, and holds this not good within the settlement, and by the mortgage the power was gone; and as to the covenant it must be shewn that the lease is within the limitations. [ 433 ] A covenant or agreement to make a lease by mortgagor is not within the power, which is not to make good all agreements for leases, but leases actually made.

As to the 2 subsequent leases, when T. joined in the assignment, and granted all his estate &c. his power under the covenant was gone. As to the last lease made by the receiver under the order of this Court, though by the order the receiver was to make leases generally with consent of T. that must be with reasonable restriction, i. e. to make leases, in order to receive the profits annually; and here is a lease made for a life upon a fine much less than the value, therefore not good, and no proof of payment of the fine nor possession, which shews it fraudulent. Bill dismissed. Nota, a like case of Corker and Ennys 2 or 3

days before, and the bill dismissed. MS. Rep. Mich. 4 Geo. 2. in Canc. Vincent v. Ennys.

\* This in the original is (D) but misprinted.

\* Br. Arbitrement, pl. 4. cites S. C. & S. P. by Ashton J. — Fitzh. Arbitrement, pl. 12. cites S. C. & S. P. pl. 37. cites 8 E. 4. 1. [and is the beginning of the S. C. of 8 E. 4. 10. b.] but I do not observe any thing in Brooke of revoking the submission. & S. P.

\* (H) *Who may revoke it.*

[1. IF 2 submit themselves to the award of J. S. one only may revoke the submission. \* 28 H. 6. 6. b. adjudged. † 21 H. 6. 30. Brooke in abridgment, 5 Ed. 4. though bound in an obligation to stand to the award; but he shall forfeit his obligation thereby. † 8 Ed. 4. 10. b. 21 H. 6. 30. Co. 8. Vinior 82. Contra ¶ 5 Ed. 4. 3. where he is bound by obligation.]

† Br. Arbitrement, pl. 49. cites S. C. † Br. Arbitrement, pl. 35. cites S. C. & S. P.

Br. Arbitrement, pl. 4. cites S. C. & S. P. by Ashton J. [2. [So] If 2 of one part, and one of the other part, submit to the award of J. S. one of the said 2 may revoke the submission without the other. Contra 28 H. 6. 6. b.] that where 2 plaintiffs and one defendant, or one plaintiff and 2 defendants, put themselves in arbitrement, there the one plaintiff nor the one defendant without the other cannot discharge the arbitrators. — Fitzh. Arbitrement, pl. 12. cites S. C. & S. P. accordingly.

Fitzh. Arbitrement, pl. 12. cites S. C. & S. P. 3. So where 2 assign auditors, the one without the other cannot discharge them; by Ashton J. quod non negatur. Br. Arbitrement, pl. 4. cites 28 H. 6. 6.

4. Note, where a man is bound to stand to the arbitrement of J. N. he cannot discharge the arbitrator; contra if he was not bound to stand to his arbitrement; but it seems clear that he cannot discharge the arbitrator in the one case and in the other, but then he shall forfeit his bond. Br. Arbitrement, pl. 35. cites 5 E. 4. 3.

— Brownl. 6. Wilde v. Viner, S. C. & S. P. adjudged accordingly. — 2 Brownl. 290. Vivion v. Wilde, S. C. & S. P. agreed. — Sid. 281. pl. 10. at the end of the Case of Nugate v. Degelder is a quare, if by the revocation of the defendant the plaintiff may be entitled to an action on the case, or any other remedy where the whole is by parol.

5. Committing admission by the ordinary is not an interest, but a power or authority, and powers and authorities may be revoked; and therefore he may revoke it. Br. Administrator, pl. 33. cites 4 H. 7. 14.

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\* This in Roll is (F) but misprinted. Noy 38. Allwaters v. Bird,

\* (I) *What shall be said a Revocation in Law.*

[1. IF a man makes a feoffment to 4, to the use of himself for life, the remainder to his son in tail, provided that if the feoffor shall find any offence or disobedience in his son, that then he, upon it



the payment of 12d. to the feoffees, may revoke the first uses, if the said feoffees do give their consent to the said revocation, and after one of the feoffees dies, the power of revocation is by this determined; for the authority cannot survive, so that the father upon the tender of 12 d. cannot revoke with the consent of the surviving feoffees. M. 43, 44 El. B. R. between *Arwater and Berte*, adjudged.]

S. C. adjudged accordingly; for consent cannot survive. — Cro. E. 856. pl. 21. *Atwaters v. Bird*, S. C.

resolved by all the Court that it is not a good revocation.

[2. If 2 submit themselves to the award of 2 arbitrators, and after by order out of Chancery the arbitrators are made commissioners, to determine the controversy between the said parties, this is no revocation of their arbitrary power. P. 40 El. B. between *Hill and Hill*, per Curiam.]

[3. If A. and B. submit to the award of J. S. and after, before any award made, revoke the authority of the arbitrator, this is not any revocation in law till notice of this revocation given to the arbitrator. Co. 8. \* Vinior 82. per Curiam. † 8 Ed. 4. 10. b. 21. b.]

\* 2 Brownl. 290, 291. *Vivion v. Wilde*, S. C. & S. P. agreed. — Brownl. 62. *Wild v.*

Viner, S. C. but not so clear as to this point. which is the beginning of the case of 8 E. 4. 10. b. but I do not observe S. P. there in *Brooke*.

† Br. Arbitrement, pl. 37. cites 8 E. 4. 10. b.

[4. If A. of the one part, and B. and C. a feme sole, of the other part, submit themselves to the award of J. N. and after C. takes J. S. to husband, and after the arbitrator, before any notice of the marriage, makes an award that B. and C. shall pay 30l. to A. yet this shall not bind J. S. and C. his wife, nor B. For the submission, by the marriage of C. is revoked as to B. also, and this also without any notice. P. 13 Car. B. R. between *White and Gifford*, & alios, per Curiam upon a demurrer; upon which the plaintiff discontinued his action by the consent of the Court. Intratur Trin. 11 Car.]

[5. If the lessor by deed licenses the lessee for years or life to alien, (who is restrained by condition not to alien without licence) and the lessor dies before the lessee aliens, yet this is no countermand \* of the licence; for the licence exempts the lessee out of the penalty of the condition, and it was executed on the part of the lessor as much as could be. Co. Lit. 52. b. cites Mich. 3 Jac. B. to be resolved.]

So where the lessor afterwards

\* Fol. 332.

granted him a licence in writing to alien part,

and then granted the reversion, and the lessee attorned, and afterwards aliened part, and adjudged good, though the alienation was after the grant of the reversion. Cro. J. 102, 103. pl. 36. Mich. 3 Jac. B. R. *Walker v. Bellamy*.

[6. If the King gives licence to alien in mortmain, and dies, yet it may be executed after. Co. Lit. 52. b.]

Br. Prerogative, pl. 106. cites F. N. B. 223. S. P.

— Pl. C. 457. a. b. in a nota there S. P. as to purchasing in mortmain, and cites S. C. and says that it seems reasonable, though the grant was not made for the King and his heirs, inasmuch as the body politic of the King granted it; for this is licence, and also interest, to purchase the house.

house ——— But Br. Prerogative, pl. 6. says the contra, and it is said elsewhere of a grant made to the tenant to alien, that this shall not serve against the next King.

7. *Letter of attorney to make livery* is revocable before it is executed; but *after execution* lawfully had the same is executed, it cannot be revoked. 5 Rep. 90. b. Trin. 42 Eliz. in Scac. Cam. in Hoe's Case.

8. If a man has a *power of revocation, and of limiting new uses*, and he *grants to new uses*, that has been over and over determined to be a revocation; but *if he has other lands*, then there is something for the words to operate on, and will not be a revocation. If a man has lands, over which he has a power of revocation, and other lands; if he *gives all his lands*, that will not amount to a revocation, in respect of the lands over which he has a power, because the words may be satisfied as to the other lands. Select Cases in Chan. in Ld. King's Time, 44. Trin. 11 Geo. Degg v. Macclesfield (Earl).

### (K) Determined.

So where A. made M. his wife and J. S. his executors, and devised his land to his wife for her life, the remainder to his daughter in tail, and if she dies without issue of her body, then his executors, by the assent of C. shall sell his land, and died. M. entered, and died. The daughter entered. C. died. The daughter died without issue. The executor who survived sold the land; but held that the sale is not good. Dal. 45. pl. 36. anno 4 Eliz. Anon. — S. P. cited per Cur. accordingly. Le. 286. in pl. 387. at the end.

1. A. Devised that J. S. and J. K. should sell his lands after his death by advice of the parson of the church of D. Before the sale the parson died. J. S. and J. K. cannot sell. Mo. 62. pl. 172. Trin. 6 Eliz. cited by Dyer, as lately adjudged in Franklyn's Case.

2. If *cestuy que use* willed that his feoffees should sell his land, they ought to sell jointly by reason of their joint possession &c. But if all the feoffees but one die before sale made by them, then he that survives may sell, because the possession of the whole is in him &c. Perk. f. 551.

3. If the will be, that the executors shall jointly sell, and one of them sells unto one man, and the other selleth unto another man, and afterwards both the executors join in a sale unto a 3d person, in this case the last sale is good, and the other sales are not good. Perk. f. 546.

4. If a man willeth that his executors and his feoffees shall sell his land, and the executors sell without the feoffees unto one man, and the feoffees without the executors sell unto another man, and afterwards the executors and the feoffees sell unto a 3d man; in this case the last sale is good, and the other two sales are not good &c. Perk. f. 553.

5. Refusal by one that has but a bare authority, shall not disable him

him from executing it. As if an executor that has a bare power to sell land &c. or an attorney to give livery, should say they would do nothing, that will not discharge the naked power; per Pollexfen Ch. J. 5 Mod. 458. in Case of Trippet v. Eyre.

6. A. indebted to B. makes a letter of attorney irrevocable to B. to receive all payments that shall become due to him, he being a sea captain. A. dies. There were wages due to A. when he died, but none at the making the letter of attorney. The Master of the Rolls held, that B.'s authority was determined, and that in neither case should he claim priority of payment from the administrators of A. who were creditors likewise. Chan. Prec. 125. Mich. 1700. Mitchel v. Eades.

(L) Transferred.

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1. IF I make a warrant of attorney to A. to make livery and seisin to J. S. of my land, A. cannot make a warrant to B. to do it, because the person who is to do it is named by myself. Arg. Kelw. 44. b. Trin. 17 H. 7.

Godb. 39. pl. 43. Arg. cites 18 E. 4. S. P.—Br. Feoffments &c. cites 9 H. 7.

pl. 47. cites 18 E. 4. 12. S. P. by Jenney.—S. P. Arg. 2 Roll Rep. 6. cites 9 H. 7.

2. Where a horse is lent for a certain time, the party to whom &c. has an interest in the horse during that time, and in that case his servant may ride; but otherwise where the loan was for a time uncertain; per North Ch. J. Mod. 210. pl. 43. Hill. 27 & 28 Car. 2. C. B. in Case of Bringloe v. Morrice.

So a difference was taken between hiring a horse to go to York and borrowing a horse; Ibid.

that in the first case the party may set his servant up, but not in the other case. Ibid.

3. A bare power is not assignable, but where it is coupled with an interest it may be assigned; as where on a lease of land lessor excepted the trees, and lessee covenanted with lessor, that he, his heirs and assigns, should from time to time, during the lease, have liberty to root up the said trees; agreed per Cur. 2 Mod. 317, 318. Trin. 34 Car. 2. B. R. Anon.

(M) Corrected in Equity.

1. Devise that his executors nominate one of his three nephews to inherit his estate; the Court decreed them to nominate one of them in a fortnight, otherwise the Court would nominate one of them itself. Fin. R. 53. Hill. 25 Car. 2. Mosely v. Mosely.

2. A. gave several legacies, and devised, that the residue of his estate should be divided among several of his kindred by name, 16

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in all, in several proportions set down by him, but devised, *that the quantity of the residuary estate should be as his executor voluntarily*, and without being thereto compelled by law, *should declare*. The executor declared what the sum of the residue was, and accordingly paid 15 of those legatees, but the 16th exhibits a bill to discover the estate, supposing it more. Decreed the executor to account. 2 Chan. Cases 198. Trin. 26 Car. 2. Gibbons v. Dawley.

S. C. cited  
Arg. Vern.  
414. in pl.  
392. — 2  
Chan. Cases  
228. Pasch.  
29 Car. 2.  
Craker v.  
Parrot, S. C.

3. A man having two daughters, one by a former wife, and another by his 2d wife, devised his estate to his wife, *to be distributed between his daughters as his wife should think fit*. She gave 1000l. to her own daughter, and but 100l. to the other. The Court ordered an equal distribution. Vern. 355, 356. in pl. 352. Arg. cites Cragrave v. Perrott.

— Fin. Rep. 354, 355. Pasch. 30 Car. 2. Spyer v. Parrot, S. C. decreed accordingly.

[ 437 ] 4. A. devised a personal estate by his will, or thereby raises money, out of his land to be *disposed among his younger children, according to the discretion of two or three persons*. Decreed the distribution to be equal. 2 Show. 242, pl. 241. Mich. 34 Car. 2. in Canc. Anon.

S. C. cited  
by the Att.  
Gen. Arg.  
Cases in  
Equity in  
Ld. King's  
Time. 74

5. An estate was devised to A. *to distribute amongst his nephews and nieces as he should think fit*. One of the nieces, to whom nothing had been appointed, brought a bill that she might have an equal share of the estate, and was dismissed. Vern. 356. pl. 352. Hill. 1685. Arg. cites it as the Case of Swetnam v. Woollaston.

6. A. has three sisters, and devised 400l. *a-piece to two, and to the 3d what his executors thought fit*. The Lds. Commissioners decreed 400l. to the 3d, if the estate would hold out. 2 Vern. 153. pl. 149. Trin. 1690. Wareham v. Brown.

7. W. by his will devised, *that his personal estate, and 400l. to be raised out of the trust-estate, should be distributed by two daughters his executrixes, amongst themselves, and their brothers and their sisters, according to their need and necessity, as in their discretion they should think fit*, and insisted on their power to dispose thereof, as they thought fit; and that the defendants were not entitled to any part thereof. The Ld. Keeper decreed a double share thereof to the plaintiff, the heir, as looking upon him to stand most in need thereof, and confirmed his former decree, which was also upon an appeal in Parliament affirmed. 2 Vern. 421. pl. 383. Pasch. 1701. Warburton v. Warburton.

S. C. cited  
Ibid. 661. in  
the Case of  
Trafford v.  
Sir R. Ash-  
ton.

8. A. by marriage settlement is tenant for life, remainder to trustees to raise 4000l. *for younger children's portions, as A. should appoint*, remainder to his first &c. sons in tail. A. has several younger children, and appoints the 4000l. among them, and particularly appoints 2600l. to B. the 2d son. After, by the death of the eldest son, B. becomes the eldest son, upon which A. makes a new appointment of the 2600l. to other children. Wright K. decreed

decreed the last appointment to stand, the first being made on an implied condition that he should not become the eldest son. 2 Vern. R. 528. pl. 476. Hill. 1705. Chadwick v. Doleman.

9. C. left a power to his wife to devise her estate among his three daughters in such proportions as she shall think fit. It was held in Chancery, that she must divide equally amongst them, unless a good reason can be given for doing otherwise. Chan. Prec. 256. in the Case of Astry v. Astry, pl. 209. Pasch. 1706. cited it as the Case of a daughter of Sir Geo. Crooke.

10. By marriage settlement it is provided, that 2500l. be distributed among the issue of the marriage in such proportion as W. Davy should appoint. He dies, leaving one child only, but makes no appointment. Decreed the child to have the 2500l. 2 Vern. R. 665. pl. 591. Mich. 1710. Davy v. Hooper & al.

11. A man gave power to his wife to devise 1000l. to and amongst his child and children, and in such manner and proportion to each child, as she should think fit. There were two children, and the elder being provided for, the mother appointed the whole to the younger. Upon which appointment a bill was brought for an unequal distribution, but was dismissed. Cited by the attorney general, Arg. Cases in Equ. in Ld. Talbot's Time, 74. as Mich. 1732. Lister v. Robinson.

So where the words of a trust were, that if R. A. the father dies without leaving by Jane his wife a son, and other issue then

living, then and in such case to raise a sum not exceeding 1500l. as soon as may be, to and for the sole benefit and advantage of such child or children (other than the eldest son of that marriage), in such proportion, manner, and form, in all respects, as the said R. should, for such purpose, by his last will in writing, direct and appoint; and in default of such appointment, then to and for the sole benefit of such child, if but one, but if more (other than the eldest) equally, and in equal parts and manner, so all intents and purposes. R. by his will directs the 1500l. to be raised, and gives 450l. to his son R. 1050l. to Jane, and nothing to E. who had an estate of 4 or 500l. per ann. given him by another, and he coming into this Court for a share of the 1500l. his bill was dismissed. Cited by the Att. Gen. Arg. Cases in Equ. in Ld. Talbot's Time, 74. as March 2, 1733. Austin v. Austin.

12. Where there is a sum of money provided for younger children, and one of the younger becomes eldest, he shall have no part of this money; but where the money was by a private act of parliament appointed to be among A. B. and C. (naming them) and A. afterwards becomes eldest, he is capable of an appointment in his favour. Cases in Equ. in Ld. Talbot's Time, 93. Pasch. 1735. Jermin v. Fellows.

[ 438 ]

13. The father by marriage settlement has a power to make an appointment of a sum, not exceeding a sum certain, for portions and maintenance of younger children in such manner, and under such limitations, as he shall appoint. He has several younger children, and by his will (taking notice that the rest were provided for by their grandfather) he appoints the whole sum to one. This is not a good pursuance of his power. Cases in Equ. in Ld. Talbot's Time, 72. Pasch. 1735. Menzey v. Walker.

For more of Authority in general, see *Devises, Settlement, Power, Trust, Uses*, and other proper titles.

Bail.

\* The difference between *bail* and *mainprife* is, first, he that findeth bail finds surety only to answer that special matter; but he that findeth mainprife, findeth surety to appear and answer unto that cause whereof he was imprisoned, and touching all

## Bail \*.

## (A) To what Time Bail shall relate.

[1.] IN B. R. though the *bail* of the defendant be taken and entered the last day of the term, and the bill be put in at any time the same term, this is well enough by the course of the King's Bench, though in strictness of law the defendant is answerable but from the bail, as in *custodia mareschalli*, and not before. Hobart's Reports 96. between † *Plat and Plummer*, adjudged in a writ of error.]

other matter and causes that shall be objected against him. 2dly, The pledges and surety of him that is delivered to bail may imprison him whose surety they are; for Stuard, Ch. J. in 33 E. 3. said, that they were his gaolers or keepers, and if they suffered him to escape they should answer for the same. 3dly, The etymology of either of them doth shew and manifest the difference betwixt them, for in the one the prisoner is delivered by the judge, judges, or courts, into the hands, and, as it were, into the prison of the sureties; for the words be, *traditur in ballium*; but in the other cases the words be, that such and such a man *ceperat* without any such delivery made by the Court, as in the other case. 4d. Coke of Bail and Mainprife, cap. 3.

† Hob. 70. pl. 82. S. C. ruled accordingly in error in the Exchequer Chamber. — Cro. J. 384, pl. 13. Mich. 13 Jac. in Cam. Scacc. and the judgment in B. R. affirmed; because the bill, whensoever it was filed, has relation to the first day of the term, and the day of filing is not material. — Jenk. 295. pl. 44. S. C.

a Lev. 13. Fatlow, alias Castle v. Bateman, S. C. resolved accordingly; for no action can be depending, nor declaration delivered

2. In *trover and conversion* after verdict for the plaintiff, it was moved in arrest of judgment, that the *action was commenced in Hil. Term*, and the *conversion alleged to be the 3d of February in the same term*, and the bill filed relates to the first day of the term, so before the cause of action. But resolved, that if the bail was entered before the 3d day of February, it is well enough; for it is that which gives this Court jurisdiction. Vent. 135. Trin. 23 Car. 2. B. R. Tatlow v. Bateman.

till the defendant is in *custodia mareschalli*, which he is not till the bail filed, \* and the bail is filed of a day certain, and thereupon it was referred to the secondary to examine when the bail was filed. — 2 Keb. 790. pl. 28. Bateman v. Colclow, S. C. held accordingly. — S. P. 6 Mod. 33. Mich. 2 Ann. B. R. accordingly.

\* [ 439 ]

3. So the *statute of limitations* may be pleaded to an action, if the time be elapsed before the day wherein the bail is filed, though not before the first day of the term wherein the action is brought, for the

the action shall not be said to be depending until the bail is filed; and upon search it was found, that the bail was filed the last day of the term. Vent. 135. Trin. 23 Car. 2. B. R. in Case of Tatlow v. Bateman.

4. Bail was put in Mich. Term and excepted against, and additional bail put in in Hilary term, and the doubt was, if the additional bail were of Mich. term; and some said, the bail must refer to the return of the writ, and others would have it refer to the recognizance entered into. The mischief would be in this case, to make the bail refer to Mich. term, that if bail had aliened bona fide in the interim, to have the land charged with the recognizance by that relation. Holt said it has been an old question, whether bail in B. R. be liable from the time of the recognizance, or from the time of the judgment; and the Court here ordered proceedings to stay till they had considered of it. 12 Mod. 318 Mich. 11 W. 3. Corps v. Kitchen-Hall.

1 Salk. 100.  
pl. 12. Hill.  
11 W. 3.  
Anon. seems  
to be S. C.  
and per Cur.  
this is only  
bail of  
that term  
wherein the  
additional  
bail was gi-  
ven, for it is  
not bail still  
completed,  
and making  
the addi-

tional bail to be bail of the first term, might do wrong to a third person who might be a purchaser after the first, and before the additional bail put in.

(B) How it shall be performed. [What render of Principal will be a Discharge of the Bail, pl. 1 to 12. What other Thing the Bail may plead in Discharge, pl. 12, 13, 14, 16. Bail charged. How far, pl. 15.]

See several  
divisions af-  
ter as to  
those mat-  
ters.

[1. IF a scire facias be brought against the bail in Banco, upon a judgment had against the principal, and judgment given there against the bail, if no capias ad satisfaciendum was awarded against the principal before the suing of the scire facias, this is error, for by law it ought to be. Mich. 13 Car. B. R. between South and Griffith, per Curiam, as well in Banco as in Banco Regis.]

Cro. C. 481.  
pl. 4. S. C.  
says, that in  
C. B. Hobart  
Ch. J. held  
that execu-  
tion might  
be there a-  
gainst the

bail where no capias was against the principal, because the recognizance in C. B. differs from that in B. R. where it is in a sum certain, that the principal shall render his body; but the others in C. B. held e contra, and that it is all one in C. B. and B. R. and so was the opinion of all the Court of B. R. ———— Jo. 396. pl. 4. S. C. but S. P. does not appear.

[2. If the defendant in an action in Banco finds bail, and after judgment against him, and a capias awarded, if he does not render himself before the capias returned non est inventus, and filed, yet he may render himself after the return and filing thereof, to save the bail. Mich. 8 Jac. B. between Boothbye and Davenant.]

[3. But in Banco Regis, if the principal renders himself to prison after the capias against him returned non est inventus, and filed of record, this will excuse the bail by the course of the King's Bench. Hill. 4 Jac. B. R. between Fletcher and Muffet, per Curiam.]

Noy 111.  
Fletcher v.  
Muffet, is  
not S. P.

[4. So

Cro. E. 61 R.  
pl. 4. *Walm-  
sley v. Ha-*

[ 440 ]

vand. S. C.

the scire

facias was

returned ni-

hil. The

bail brought

in the prin-

cipal, who

prayed that

he might render

himself in discharge

of his sureties, and he was committed, and the bail

discharged; and the Court said, that there had been divers precedents of that kind in this Court;

and although he had rendered himself after the 2d scire. fa. awarded, before judgment thereupon, he

had been received.

[4. *So in Banco Regis, vel Banco*, if the principal renders himself after the said return of the capias, and after the first scire facias awarded against the bail, and before the return thereof, this will discharge the bail. Hill. 4 Jac. B. R. between \* *Fletcher and Muffet*, per Curiam. Mich. 8 Jac. B. between *Boothbye and Davenant*, resolved upon demurrer, though the prothonotaries said, that their course was contrary in Banco. Contra Mich. 40, 41 El. B. R. between \* *Walmesley and Haver* adjudged.]

[5. *So if bail be taken, and judgment given in Banco, and after this comes in Banco Regis by writ of error, and there a capias is awarded against the principal, and returned non est inventus, and filed, and a scire facias awarded (\*) against the bail, yet if the principal renders himself to prison before the return thereof, the bail are discharged thereby, by the course of the King's Bench.* Hill. 4 Jac. B. between *Fletcher and Muffet*, per Curiam.]

[6. In Banco Regis, if the principal be returned non est inventus, and a scire facias awarded against the bail, who are returned summoned, and filed, and they at this day do not bring in the principal, they shall be charged. Hill. 4 Jac. B. R. in *Fletcher and Muffet's Case*; per Popham and Williams.]

[7. But if the bail, in the said case, be returned nihil, and an alias is awarded, they may bring in the principal well enough at the return thereof, and discharge themselves. Hill. 4 Jac. B. R. in *Fletcher's Case*, per Popham and Williams. Mich. 2 Car. between \* *Calfe* and alios plaintiffs, and *Dingley and Davies* defendants; which intratur Hill. 22 Jac. Rot. resolved per Curiam, B. R. that the bail in discharge of himself, may bring in the principal at any time before the return of the second scire facias, but after the day of the return of the 2d scire facias against the bail past, though the 2d scire facias is not filed of record, yet the day of the return being past, the bringing in of the principal afterwards will not excuse the bail. P. 11 Car. B. R. between *Vawdie and Avis*, per Curiam adjudged, and the clerks said it was the course.]

\* Jo. 138.

pl. 4. S. C.

& S. P. that

it was so said

by Broome,

and so agreed

by all, that

if the de-

fendant was

alive, the

bail may

bring him in

at any time

before the

2d scire fa-

cias; and

that several

years in the

reign

of Q. Eliz.

they were

allowed to bring

in the defendant

on the return of the 2d scire facias, but this was ex

gratia Curie.——Lat. 149. S. C. but S. P. does not clearly appear.——3 Bull. 331. S. C.

but S. P. does not clearly appear.——Poph. 185. *Calfe v. Nevel*, S. C. but S. P. does not

appear.

[8. If upon the return of the first scire facias against the bail in Banco, the principal comes in and renders himself, this will excuse the bail. Mich. 10 Jac. b. between the Earl of *Hertford and Kerton*, adjudged.]

[9. If



[9. If the principal, in discharge of his bail, renders himself in Banco Regis to a tip-staff of the King's Bench, in the morning of the last day of the return of the 2d scire facias, and after dinner of the same day the tip-staff carries him to a judge of the said court, who commits him to prison in execution, in discharge of his bail, but this is not entered of record till another day, but then this is entered as committed the last day of the return, though the clerks of the court say, that if he rendered himself, or was committed after dinner, this is not sufficient to discharge the bail, and though the time of the render and commitment appears upon examination as before, yet in as much as the time of his commitment does not appear upon record, but only that he was committed such a day, \* the Court will intend that he was committed in the morning according to law, in discharge of his bail. Tr. 16 Car. B. R. between Owen and Griffith, adjudged.]

Bail may bring in the principal any time before the return of the 2d scire facias, but if it be the last day, it must be (per Twifden) sedente Curia; for he said he remembered a case, where the bail brought in the principal as judge pl. 359 (bis). [ 441 ]

Bardet [Berkley] was going down the hall, and it was too late. Freem. Rep. 441. Mich. 1676. Anon.

[10. If A. recovers in debt in Banco against B. and after B. brings a writ of error in B. R. which is allowed in Banco, and after before the return of the writ of error, the bail by habeas corpus brings into court the said B. in exonerationem manucaptor. yet this is no discharge of the bail, because the writ of error is a superfedas, so that he cannot pray him in execution, which is the intent of the bail; but if the record be not removed at the return thereof in Banco Regis, and after B. is brought into court by habeas corpus, this will be a discharge of the bail, for there he may be put in execution. Hobart's Reports 161. Bradshaw's Case.]

Hob. 216 pl. 142. Wickstead v. Bradshaw, S. C. —But contra it was agreed per Cur. and the attorney general, that the bail may render the principal pending a writ of error, though during that time the plaintiff cannot charge him in execution. 7 Mod. 77. Mich. 1 Anne B. R. in Case of Goodwin v. Hilton. —7 Mod. 98. S. C. & S. P. agreed per Cur. accordingly.

[11. If in an action in Banco Regis, A. & B. are bail for another, and after judgment against the principal, he brings a writ of error in Camera Scaccarii, and pending this writ of error, the bail bring in the principal, or this principal renders himself to prison, though the recoverer cannot pray him in execution, nor (\*) can the Court put him in execution, because the writ of error is a superfedas to it, yet this is a good discharge of the bail; for the marshal ought to keep him in prison as a pledge, till the judgment be affirmed or disaffirmed, as he does upon mean process for want of bail. Mich. 2 Car. B. R. between Calfe and alios plaintiffs, and Dingley and Davies defendants per Cur. Intratur Hill. 22 Jac. B. R. Rot. Hill. 12 Car. B. R. between Cotton and Olberry, per Curiam, adjudged; contra H. 2. Jac. B. R. between Codnor and Henderson †, per Curiam.]

Lat. 149. S. C. & S. P. accordingly, by Crew Ch. \* Fol. 335. J. and Jones J. —3 Bull. 331. S. C. & S. P. held accordingly. —Jo. 138. pl. 4. S. C. & S. P. resolved accordingly. —Noy 82. S. C. & S. P. 100. Hill. 16 & 17 Car. 2. B. R. in the Case of Adams v. Tomlinson the Court held that notwithstanding a writ of error, the bail may bring in the principal in discharge of the mainpernors. † Poph. 186. cites Cadnor v. Hilderfon, S. C. —Lat. 149. cites Cadnor v. Anderson, S. C.

S. P. appears but imperfectly. —Poph. 185. Calfe v. Nevil, S. C. —Raym. 100. Hill. 16 & 17 Car. 2. B. R. in the Case of Adams v. Tomlinson the Court held that notwithstanding a writ of error, the bail may bring in the principal in discharge of the mainpernors. † Poph. 186. cites Cadnor v. Hilderfon, S. C. —Lat. 149. cites Cadnor v. Anderson, S. C.

[12. If

Cra. J. 471.  
pl. 10. S. C.  
adjornatur.  
2 Bail.  
230. 231.  
S. C. says  
that the re-  
lease was  
made to the  
principal  
and the  
bail, and  
that the  
whole Court  
was clear  
of opinion  
that by this  
release the  
debt is dis-  
charged,  
and that it

being thus pleaded by the bail in bar to the scire facias, is a good plea, but they would not at this time over-rule the same; and the parties, perceiving the opinion of the whole Court, did rest satisfied therewith, and never moved it again.—Mo. 852. pl. 1167. S. C. resolved a good

[ 442 ] bar, because the debt and duty remain notwithstanding the error brought, and that it is not like to a bare possibility.—Roll Rep. 386. pl. 7. S. C. adjornatur.—The bail cannot say that the principal has paid the money, if he has not an acquittance or matter of record to prove it. Arg. Sty. 324. Pasch. 1652. cites the Case of Barnes v. Corbet.—In scire facias on a judgment had against the principal for 25 l. 6 s. 8 d. the bail pleaded that the principal, after the judgment, paid the plaintiff 34 l. in satisfaction of the debt due on the judgment, which he accepted; but adjudged for the plaintiff upon demurrer; for though the bail may plead payment to the plaintiff, in regard of the condition of his recognizance, which is to pay the condemnation or to render the body, which the defendant cannot plead, yet the bail shall not plead payment of a less sum in satisfaction, after the money is become due. 2 Lev. 212. Mich. 29 Car. 2. B. R. Holmes v. the Manucaptors of Brown.

\* Orig. is  
(A.)

[14. If *A.* is bail for *B.* in *B. R.* in an action of battery, at the suit of *C.* and a verdict and judgment is given in this against \* *B.* for 100 l. damages and costs, and pending this action; and before judgment another action of battery is brought in Banco by *C.* against *D.* another for the same battery, and a verdict against him for 20 l. damages, and after the judgment against *B.* judgment is given in Banco against *D.* and execution and satisfaction thereupon acknowledged in Banco, in a scire fac. upon the judgment in Banco Regis against *A.* the bail to have execution of the judgment for the 100 l. damages, the bail cannot plead this recovery and satisfaction in Banco, for it is not within the condition of his recognizance. P. 11 Car. B. R. between Barnes and Hills, adjudged upon demurrer. Intratur Hill. 10 Rot. 897.]

S. P. and Popham and Fenner held clearly, that the bail is not chargeable with these costs; for they take upon them to pay only the condem-

[15. If a man be bail for *J. S.* in an action brought against him in *B. R.* and the plaintiff recovers there against *J. S.* and he brings a writ of error in *Cam. Scacc.* where the judgment is affirmed, and costs there assessed by the statute of the 3 H. 7 the bail in *B. R.* shall not be charged with these costs assessed in the writ of error, but only with the principal judgment. Tr. 4. Jac. B. R. by Tanfield and Fenner. P. 20 Jac. B. R. between Hartly and Jones, adjudged per Cur. and said by the clerks to be the common course.]

action of this Court, and not of any other; and a scire facias was awarded accordingly, the other justices being absent, &c. Cro. E. 587. pl. 20. Mich. 39 & 40 Eliz. B. R. Penruddock v. Errington.—S. P. and the whole Court was of the same opinion; and therefore a superedeas was granted to avoid the entire execution, and not for the surplussage only as was prayed; for the writ being entire cannot be divided. Cro. J. 636. pl. 4. Pasch. 20 Jac. B. R. Smith v. Faldo.—S. P. accordingly by Fennel and Tanfield J. and Kemp Secondary. Noy 18. Anon.

[16. In a *scire facias* against the bail, upon a recognizance, whether the bail may plead that the principal was taken in execution before by the sheriff upon a cap. ad satisfaciend. and thereupon paid the money. Tr. 11 Car. B. R. between Cockain and Proffter, such a plea pleaded in a foreign country, and the Court doubted whether it was a good plea, but they ordered that he should swear his plea, because it was a foreign plea.]

*Scire facias* against the bail, the defendant pleads, that before the return of the writ of *scire facias* there was a

ca. fa. against the principal, by virtue whereof he was taken and paid the money; but alleges no place where the payment was. Twissden said, you cannot make good this fault. Mod. 24. Mich. 21 Car. 2. in B. R. Binell v. Shawe.

[17. In a *scire facias* against the bail upon his recognizance the bail cannot plead that the principal paid to the plaintiff 80 l. in satisfaction of the judgment, which was 100 l. and thereupon the plaintiff acquitted and discharged the principal of the judgment; for 80 l. cannot be any satisfaction of 100 l. and this is also pleaded without deed, or matter of record. Mich. 16 (\*) Car. B. R. between Orton and Holton, and alios, adjudged upon demurrer. Intratur Trin. 16 Car. Rot. 560.]

\* Fol. 336.

[18. Rotulo Parliamenti, 7 H. 5. numero 21. The commons prayed, that in a *scire facias* upon a recognizance for appearance in court, to find sureties of the peace, that the party might save his default by the increase of water, imprisonment, infirmity, or command of the king, or his lieutenant, guardian of England, of which it was now doubted, whether he could save the default for these causes.]

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\*(C) Answer, Let the Common Law be kept.

[Bail discharged by Death of Principal, pl. 1, 2.

By what Plea, pl. 3.

Charged how far, by what Words, and what a Forfeiture, pl. 4, 5, 6. 12.

What is to be done upon a Render, pl. 7, 8, 9, 10, 11.]

[1. IF A. becomes bail for B. in an action at the suit of C. and after C. recovers against B. and afterwards the *capias* against B. is returned non est inventus, and this is filed of record, and after B. dies before any *scire facias* sued against A. yet this will not excuse A. the bail, in as much as B. died after the *capias* returned and filed, and yet he might in his discharge have brought in B. (if he had been living) before the second *scire facias* returned, but this

\* This by mistake of the printer (as I suppose) is distinguished with the letter (C), but it should have been a continuation of (B), and the pleas have gone regularly on. Cro. J. 163. pl. 2. Tymperley v. Coleman, S. C. and is

scire facias is ex gratia Curiz. Trin. 5 Jac. B. R. between *Timberley and Boothe*, adjudged upon demurrer.]

Court held that the pleading the death of the principal before the sci. fac. brought, is not sufficient without more; for by the return of non est inventus on a capias, the recognizance is forfeited, because there was default in the party, and though it be usual that if the principal render his body on the first scire facias to accept it, yet that is ex gratia, and not of necessity; and therefore the death at the time of the scire facias brought is not material, if he was alive when the capias was returned; and judgment for the plaintiff. —Hutt. 47. S. C. cited per Cur. by the name of *Timberley v. Calverley* says, that in scire facias against the bail, judgment upon argument was given against the plaintiff. —S. C. cited, and the precedent produced Jo. 30. —Resolved that the recognizance of the bail is forfeited, if the defendant dies after the capias returned, and before any scire facias brought. Jo. 139. pl. 4. Trin. 2 Car. B. R. in the Case of *Calfe v. Dingley and Davies*.

\* Jo. 139. pl. 4. S. C. & S. P. says, that it seems that by the death of the defendant after the capias awarded, and before the return of it, the recognizance is not forfeited, for he [2. But otherways it had been, if he had been dead before the capias returned and filed. Trin. 5 Jac. B. R. per Curiam agreed. Mich. 2 Car. B. R. between \* *Calfe* and alios plaintiffs, and *Dingley and Davies* defendants, adjudged upon demurrer, in as much as it was not averred by the plaintiff in the scire facias against the bail, that there was a capias returned against the principal before his death, which ought to have come of his part (but it seems this is not law), and there cited by justice Jones 43. Eliz. B. R. between *Hobbs and Dancafter* adjudged; that the death of the principal before the return of the capias discharges the bail.]

has time always to come into court, and render himself before the time of the return, so that if he dies before such time, the bail is discharged. —Bulst. 331. S. C. adjudged against the plaintiff. —Eat. 149. S. C. & S. P. accordingly. —Noy 82. S. C. & S. P. ruled accordingly. —Poph. 185. Case v. *Nevil*, S. C. adjudged accordingly.

† Mo. 432. pl. 607. *Hobbs v. Tadcastle*, S. C. & S. P. adjudged accordingly in an audita querela brought by the bail. —Cro. E. 597. pl. 1. S. C. adjudged accordingly; for the recognizance of the bail that the principal shall render himself, &c. is to be intended upon process awarded against him, &c. —Gouldsb. 174. pl. 108. S. C. adjudged accordingly. —S. C. cited, Jo. 29, 30. —S. C. cited in the Case of *Calfe v. Bingley*. Noy 83. —S. C. cited by Jones J. Poph. 186. —S. C. cited Lat. 150. —S. C. cited Hutt. 47. —S. C. cited by Jones J. 3 Bulst. 342.

[ 444 ] [3. If B. be arrested at the suit of A. and this is returned in Banco, where B. and C. as his bail, become bound in a recognizance, viz. B. in 200 l. being the principal, and C. the bail in 100 l. that B. shall appear to an action to be brought &c. according to the usual form, and afterwards judgment is given against B. in the action, and after a scire facias is brought against B. and C. upon their several recognizances, who plead the release of A. to B. the principal, of all debts, duties, judgments, executions and demands; this is a good plea, as well for B. the principal as for C. the bail, because this discharges the debt and judgment, and the bail may well plead a satisfaction of the judgment, and the release is a satisfaction. Pasch. 21 Car. B. R. between *Bancroft and Willet*, adjudged upon a demurrer. Intratur Hill. 20 Car. Rot. 329. Farmer.]

[4. If a man taken in execution upon a statute at the suit of J. S. sues an audita querela in Chancery to avoid this for usury, and finds there 4 manucaptors ad standum juri, & ad prosequendum cum effectu, and after the parties plead to issue, which is found against the

Cro. J. 25. pl. 2. Pasch. 2 Jac. B. R. S. C. but S. P. does

the

*the plaintiff in the audita querela*, the manucaptors by this recognizance are bound to bring in the body of the plaintiff in person, *quousque* &c: or to satisfy the debt, though there be no mention thereof in the condition of the recognizance; for by the words (*ad standum juri*) is intended to stand to the judgment of the Court; for otherways these words would be idle, inasmuch as the first words (*ad prosequendum cum effectu*) will compel him to do all that which is to be done before judgment; and to stand to the judgment of the Court, is to pay the judgment. Pasch. 3 Jac. B. R. between *Barnes and Worlich*, adjudged.]

Eliz. B. R. the S. C. but S. P. does not appear. But *ibid.* 59. S. C. and S. P. adjudged per tot. Cur. Noy 41. S. C. but S. P. does not appear.

[5. If a man brings a writ of *error upon a judgment in Banco*, and finds manucaptors to prosecute it with effect, and after does not take out any writ of *scire fac. ad audiendum errores*; this is a forfeiture of the recognizance of the manucaptors, for this is a default in him. Hill. 13 Jac. B. R. between *Sir Thomas Middleton and Twinio*, adjudged.]

[6. So in this case, if he takes out the *scire facias*, but does not deliver it to the sheriff, this is a default which will forfeit the recognizance; for he ought to deliver it to the sheriff. Hill. 13 Jac. B. R. between *Sir Thomas Middleton and Twinto*, adjudged.]

[7. If the principal renders himself in court in *exoneratione manucaptoris*, this ought to be entered of record. Hobert's Reports, 283. between *Welby and Cunning*.]

—pl. 1249. *Wolby v. Davenant & Cuning*, S. C. and reddidit se a good plea, But triable by the record, and not per pais.

[8. [And] when the principal renders himself in *exoneratione manucaptoris* in court, if the plaintiff or his attorney be present, he ought to make his election to take him in execution, or to refuse him, of which an entry is to be made of record. Hobert's Reports, 284.]

[9. But if the plaintiff be absent at the time of the render, he ought not to be presently discharged, because the time of the render is uncertain, and therefore he ought to be committed, so that the plaintiff may have time to make his election. Hobert's Reports, 284.]

cordingly.—Mo. 888. pl. 1249. *Wolby v. Davenant & Canning*, S. C. & S. P.

[10. And when in the said case he is committed, the use is to call the plaintiff or his attorney to take him in execution, or to relinquish him, and to enter this acceptance or refusal of record. Hobert's Reports, 284.]

S. P. accordingly.—A rule for discharge of the bail in such case was entered thus, viz. That the defendant offered himself in discharge of his sureties, & attornatus querentis allocatus per Curiam, & dixit se nolle, &c. Ideo consideratum fuit per Curiam, quod tam predictus descendens, quam

not appear. —*Ibid.* 67. pl. 8. Pasch. 3 Jac. Worlich v. Massey, S. C. & S. P. accordingly, and adjudged for the plaintiff, nisi, &c.—Yelv. 30. Hill. 44

Fol. 337.

Roll Rep. 329. pl. 36. S. C. & S. P. per Cur. accordingly.

Roll Rep. 329. pl. 36. S. C. & S. P. held accordingly, and judgment for the plaintiff.

Hob. 210. pl. 267. Mich. 15 Jac. S. C. —Mo. 888.

Hob. 210. pl. 267. Mich. 15 Jac. Welby v. Canning, S. C. & S. P.

[ 445 ] Hob. 210. pl. 267. Mich. 15 Jac. Welby v. Canning, S. P. accordingly.

Hob. 210. pl. 267. Mich. 15 Jac. Welby v. Canning, S. C. &

predicti

prædicti manucaptors, de recognitione prædicta & denariis in eadem contentis exonerentur. 14. 58. pl. 74. Falsch. 29 Eliz. C. B. Fulwood v. Fulwood.

Hob. 210.  
pl. 267.  
Welby v.  
Canning,  
S. P. ac-  
cordingly.

Cro. E.  
543. pl. 12.  
S. C. ad-  
judged ac-  
cordingly  
for the  
plaintiff.

[11. *But in the said case of the commitment, if the plaintiff and his attorney be dead, there ought to be a means by record to enforce an answer, as by scire facias against the executor or administrator of the plaintiff, to answer whether he will have him in execution or not.* Hobert's Reports, 284.]

[11. *If B. be bound to A. in a bill of 20 l. and in consideration that A. will deliver to him the said bill, assumes to find 2 sufficient sureties, who will enter into an obligation to the said A. for the payment of the said 20 l. and B. after procures 2 to be bound to A. for the payment of the said 20 l. which are not of any worth or value &c. this is not any performance of the promise; for insufficient sureties are all one with no sureties.* Trin. 39 Eliz. B. R. between *Gouwer and Capper*, adjudged upon a demurrer.]

### (D) Bail. By the Statute of Westm. 1.

\* The words  
(*sheriffs and  
others*) in-  
tend sheriffs  
and gaolers  
that have  
custody of  
gaols, so as

1. *Stat. Westm. 1. 3* Forasmuch as \* sheriffs and others, which  
E. 1. cap. 15. have taken and kept in prison persons de-  
tected of † felony, and incontinent have let out by replevin such as  
are not repleviable, ‡ and have kept in prison such as are reple-  
viable, because they would gain of the one party, and grieve the other;

this act extends not to any of the King's justices, or judges of any superior courts of justice; first, for that they being superiors are not comprehended in the general words, as often has been observed. 2dly, (who have taken and kept in prison) which judges do not. 3dly, because in those days prisoners were commonly bailed by the King's writ de homine repleg. and then also by the writ de odio & atia, both which were directed to the sheriff. 2 Inst. 185, 186.

† In those days felony comprehended in it as well treason as homicide, rape, or burglary, robbery, arson, and all larcenies and thefts. 2 Inst. 186.

‡ Here it is proved that it is an offence as well to bail a man not bailable, as to deny a man bail that ought to be bailed; and the reason is yielded wherefore the sheriffs and others did so offend, because they would gain of the one, and grieve the other, viz. either for avarice, or for malice. 2 Inst. 186.

It was not  
certainly  
determined  
what people  
were reple-  
viable, and

Par. 2. *And forasmuch as before this time it was not determined which persons were \* repleviable, and which not, but only those that were taken for the † death of a man, or by ‡ commandment of the King, || or of his justices, or for the ¶ forest;*

what not, within the general words of the writ de homine repleg. 2 Inst. 186.

[ 446 ] (*repleviable*) proves that this act intends what persons were to be replevied by the common writ de homine replegiando, which was directed to the sheriff under whose custody the prisoners are, and of whom this act speaks, and so it appears by the register; and replevy, or plevy, is applied to the sheriff to take pledges and bail to the highest courts of record; and the writ de manucapione directed to the sheriff is grounded upon this act, in which writ not only replegiare but manucapere also is used. 2 Inst. 186.

† Here our act first sets down what persons were not bailable for certain offences by the common writ de homine repleg. and they are in number 4; but by the ancient law of the land, in all cases of felony, if the party accused could find sufficient sureties, he was not to be committed to prison; but afterwards it was provided, that in case of homicide the offender was not bailable. 2 Inst. 186.

‡ The words (*by command of the King*) are as much as to say (as some affirm) as by the King's courts of justice; for all matters of judicature and proceedings in law are distributed to the courts of justice, and the King does judge by his justices, 8 H. 4. fol. 19. and 24 H. 8. cap. 12. and regularly no man ought to be attached by his body, but either by process of law, that is (as has been said) by the King's

King's writs, or by indictment, or lawful warrant, as by many acts of parliament is manifestly enacted and declared, which are but expositions of Magna Charta; and all statutes made contrary to Magna Charta, which is *lex terræ* from the making thereof until 42 E. 3. are declared and enacted to be void, and therefore if this act of Westm. 1. concerning the extrajudicial commandment of the King be against Magna Charta, it is void; and all resolutions of judges concerning the commandment of the King, are to be understood of judicial proceedings. 2 Inst. 187.

¶ The words (*or of his justices*) intend, upon any cause, whereof they are judges, appearing to them. 2 Inst. 187.

¶ And all these 4 are particularly excepted out of the common writ *de homine replegiando*, that the sheriff in his county court, which is not a court of record, shall not replevy any of these 4 that are committed; for example, though the party be committed by the personal command of the King, albeit the commitment be unlawful, yet the sheriff shall not deal therein by the writ *de homine replegiando*; but the superior courts at Westminster, upon a *habeas corpus*, &c. shall do justice to the party in all these 4 causes; so as Stamford, being well considered, impugneth not in any sort this opinion; for his opinion extends only to the county court upon the writ *de homine replegiando*, and not to the superior courts. 2 Inst. 187.

Par. 3. *It is provided, and by the King commanded, that such prisoners as before were* \* outlawed, *and they which have* † abjured the realm, ‡ provers,

\* Persons outlawed are attainted in law and therefore

are not repleviable, or to be bailed; for if a man be arraigned of homicide, and pleads not guilty, and is found guilty, and for difficulty of clergy is reprieved, it was resolved by the justices that he was not bailable; for the intendment of the law in bails is *quod stat indifferenter*, whether he be guilty or no; but when he is convicted by verdict or confession, then he must be deemed in law to be guilty of the felony, and therefore not bailable at all, a fortiori, when the party is attainted in law. 2 Inst. 187, 188.

And yet if the party upon the cap. utlag. plead misnomer, or allege error, &c. he may be bailed. 2 Inst. 188.

† Persons having abjured are also attainted upon their own confession, and therefore not bailable at all by law. 2 Inst. 188.

‡ The reason wherefore provers or approvers be not bailable, is; for provers do first confess the felony to be done by themselves, and therefore they are not bailable, because it appears that they be guilty of the fact. 2 Inst. 188.

*And such as be* \* taken with the mainer, *and those which have* † broken the King's prison, *thieves openly defamed and known, and* ‡ such as be † appealed by provers, *so long as the provers be living (if they be not of good name),*

\* For in this case non stat indifferenter, as hath been said, whether he

be guilty or no, being taken with the mainer, that is, with the thing stolen as it were in his hand, anciently called *handhabbend*. The like is anciently called *backberend*, as a bundle or fardle at his back, which Bracton uses for manifest theft, *furtum manifestum*, and so doth Britton. 2 Inst. 188.

† Here are 2 offences; 1st, his breaking of the prison; for it is presumed that he that is innocent will never break prison; and 2dly, his flying, *quia fatetur facinus, qui iudicium fugit*. 2 Inst. 188.

‡ The appeal of the approver is forcible against the appellee, because the approver confesses himself guilty of the same felony, and therefore it serves in nature of an indictment against the appellee so long as the approver lives, unless the appellee be of good fame; but yet the general words do receive qualification; for albeit the prover be alive, yet if the approver waive his appeal, the appellee shall be bailed, if no other appeal be against him. 2 Inst. 188.

*And such as be taken for* \* house-burning feloniously done, *or for* † false money, *or for* ‡ counterfeiting the King's seal;

[ 447 ]  
\* Burning of houses, &c. was felony

by the common law, as it appeareth by this act, and by our ancient authors, viz. Glanvill, the Mirror, Bracton, Britton, and Fleta. And this seemeth to be the law before the conquest. 2 Inst. 188.

† This appears to be treason by the common law. 2 Inst. 188.

‡ This was also treason by the common law, as it appeareth by the said ancient authors; and both these were declared to be high treason at the common law by the statute of 25 E. 3. cap. 1. See more hereof in the 3d part of the Inst. 2 Inst. 189.

\* That is, he that is certified

*Or persons \* excommunicate, taken at the request of the bishop, or for † manifest offences;*

into Chancery by the bishop to be excommunicated, and after is taken by force of the King's writ of excommunicato capiendo (which is so called of writs in the writ called a significavit), is not bailable, for in ancient time men were excommunicated but for heresies, propter sepram animæ, or other heinous causes of ecclesiastical consueance, and not for small or petty causes; and therefore in those cases the party was not bailable by the sheriff or gaoler without the King's writ; but if the party offered sufficient caution de parendo mandatis ecclesiæ in forma juris, then should the party have the King's writ to the bishop to accept his caution, and to cause him to be delivered, and if the bishop will not send to the sheriff to deliver him, then shall he have a writ out of the Chancery to the sheriff for his delivery; or if he be excommunicated for a temporal cause, or for a matter whereof the ecclesiastical court hath no consueance, he shall be delivered by the King's writ without any satisfaction. 2 Inst. 189.

One taken by an *excommunicato capiendo* upon the stat. 5 Eliz. cap. 27. and brought to the bar by hab. corp. was bailed, by the opinion of all the justices, contra Williams. Bult. 122. Pasch. 9 Jac. Anon. — Ibid. Yelverton J. said, that so it was resolved in one KERSN'S Case, where he was taken by a writ de excommunicato capiendo brought hither by a habeas corpus, and upon cause shewed, he was bailed by the Court de die in diem, but neither the sheriff nor any justice of the peace in the country can bail such a one, but this Court here may well bail one, as in the case before, de die in diem.

† Or for open or manifest offences; for, as has been said, bail is quando stat indifferenter, and not when the offence is open and manifest. 2 Inst. 189.

One was found guilty of felony, but it being doubted whether clergy was allowable or not, he was reprieved without judgment; and the justices held, that he is not bailable, because by his being convicted he is more than one vehemently suspected; and the intendment of the law in bails is, quod stat indifferenter if he be guilty or not, till trial, &c. D. 179. a. pl. 42. Pasch. 2 Eliz. Anon. — Jerk. 219. pl. 68. S. P. and as to him that is convicted, two juries have passed upon him, and it is evident that he is guilty. By all the judges of England.

\* For by the common law a man accused or

*Or \* for treason touching the King himself, shall be in † no wise replevisable by the common writ, nor without writ.*

indicted of high treason, or of any felony whatsoever, was bailable upon good surety; for at the common law the gaol was his pledge or surety that could find none. And thus appears by Glanvil, who says, *Is qui accusatur, ut prædiximus per plegios saluos & securos solet attachiari, ut si plegios non habuerit, in carcerem detruadi*; so as a man by the common law was bailable for any offence until he were convicted; and this seems to be the old law of the land before the conquest; viz. *Ingenius quique fidei iussiores, qui enim (si quando in crimen vocetur) jus suum cuique tribuere quam paratissimum fore prestant, fidissimos adhibeto.* 2 Inst. 189.

† That is, the sheriff shall not replevy them by the common writ de homine replegiando; nor without writ, that is, ex officio; but all or any of these may be bailed in the King's Bench, &c. 2 Inst. 189.

This act divides larceny into two kinds, viz. grand and petit; grand larceny is when the thing stolen is above the value of 12 d. and petit larceny is,

4. *But such as be indicted of larceny by \* inquests taken before sheriffs or bailiffs by their office, or of light suspicion, or for petty larceny that amounted not above the value of 12 d. if they were not guilty of some other larceny aforetime, or guilty of receipt of felons, or of commandment or force, or of aid in felony done, or guilty of some other trespass for which one ought not to lose life nor member, and a man appealed by a prover after the death of the prover (if he be no common thief nor defamed) shall from henceforth be † let out by sufficient surety, whereof the sheriff shall be answerable, and that without ¶ giving aught of their goods.*

when it is of the value of 12 d. or under, and the things stolen are to be reasonably valued, for the ounce of silver, at the making of this act, was at the value of 20 d. and now it is of the value of 5 s. and above. 2 Inst. 189, 190.

[ 448 ] \* That is, of sheriffs in their tournes, or lords in their leets, or those that have infang-thief and outfang-thief &c. 2 Inst. 190.

† That is to be understood where the indictment was taken before the sheriff in his tourn, where there he was judge of the cause, for other prisoners could not be bailed without writ; and if the sheriff



iff, having sufficient surety offered to him, refused to bail him, he should have a writ de manucap-  
tione directed to the sheriff to take pledges of him; and if the *bailiff of a hundred* (which is *intend-*  
*ed of a steward in a leet*) refused to take pledges of one indicted before him, the prisoner should have  
had a writ de manucapione to the sheriff to take pledges of him; and all this appears by the writ  
de manucapione. But since this time this writ of manucapione is taken away by the statute of 28  
E. 3. 2 Inst. 190.

¶ For neither the sheriff, nor other of the King's officers could take any thing for doing his office.  
2 Inst. 190.

Par. 5. *And if the sheriff or any other let any go at large by surety, that is not replevisable* \* if he be sheriff, or constable, or any other  
bailiff of fee which has keeping of prisons, and thereof be attainted,  
he shall lose his fee and office for ever.

\* So as at  
this time  
there were  
sheriffwicks  
in fee, and  
constables

and bailiwicks in fee, which had the keeping of prisons; these being attainted of letting to bail of  
any prisoner not bailable, should lose the fee and bailiwick for ever; and upon office found, the King  
should have the inheritance of the office in him to be grantable over. 2 Inst. 190.

Par. 6. *And if the* \* *under-sheriff, constable, or bailiff of such as* \* *Note the*  
*have fee for keeping of prisons, do it contrary to the will of his lord,* *act of the*  
*or any other bailiff being not of fee, they shall have three years impris-* *under-sher-*  
*onment, and make fine at the King's pleasure.* *iff, or un-*  
*der bailiff;*  
*without the*

assent of his superior, is no forfeiture of the fee or bailiwick of his superior, though in many other  
cases the superior shall answer for his deputy. 2 Inst. 191.

Par. 7. *And if any* \* *with-hold prisoners replevisable, after that* \* *Here it*  
*they have offered sufficient surety, he shall pay a grievous amercement* *appeareth,*  
*to the King.* *that to deny*  
*a man ple-*

plevisable, and thereby to detain him in prison, is a great offence, and grievously to be punished.  
2 Inst. 191.

Par. 8. *And if he takes any reward for the deliverance of such, he*  
*shall pay double to the prisoner, and also shall be in the great mercy of*  
*the King.*

1 & 2 P. & M. cap. 13. f. 2. *No justice or justices of peace shall* Upon an as-  
*let to bail or mainprise any persons forbidden to be replevised or bailed by* sembly of  
*Westm. 1. cap. 15.* all the jus-  
tices and  
barons of

the Exchequer at Serjeants Inn in Fleet-street, this term, it was resolved by them, and so agreed to  
be hereafter put in execution in all circuits, That if a man taken for felony be examined by a justice  
of peace, it appeareth that the felon is not bailable by the law, and yet the justices commit him to  
gaol but as upon suspicion of felony, not making mention for any cause for which he is not bailable,  
whereby he is brought before another justice of peace, not knowing of any matter why he ought  
not to be bailed, whereupon they bail him, these justices ought to be fined by the statute of 1 & 2  
Ph. & Ma. for they offend if they bail him who by the statute of Westm. 1. is not bailable, and  
therefore they at their peril ought so to inform themselves, before the bail taken, of the matter, that  
they may be well satisfied that such a one is bailable by law; and therefore observe well the statute  
of Westm. 1. cap. 18. who is bailable and who is not by the law. Poph. 96. pl. 1. Trin. 37  
Eliz. — 2 Hawk. Pl. C. 90. cap. 14. f. 12. S. P. and cites S. C. — And. ibid. f. 15. says, that  
the offence of denying or obstructing bail, where it ought to be granted, seems to be a misdemeanor  
not only by the statute, but also by the common law, and punishable thereby as an offence against  
the liberty of the subject, not only by action at the suit of the party wrongfully imprisoned, but also by  
indictment at the suit of the King. But ibid. f. 14. says, it seems clear, that he who has power to  
bail another is not bound to demand of him to find sureties, and to forbear committing him till he  
shall refuse to find them, but may well justify his commitment, unless the party himself shall offer  
his sureties.

For more as to this statute see the division of, Bail in Cri-  
minal Cases.

## (E) By the Statute 23 H. 6.

4 Rep. 76. b. in Holland's Case, per Cur. this act which extends only to the sheriffs, is but a particular and special act, and

cites it as held so 3 Mar. Dyer 119. a. [Thrower v. Whetstone.]—But Lev. 86. Mich. 14 Car. 2. B. R. it was said by Twisden, that it was held by Roll and Glyn when they were chief justices here, that this statute was a general law of which the King's Court ought to take notice, without pleading of it.—Hale Ch. J. held, that this statute was a general law. 2 Lev. 103, 104. Pasch. 26 Car. 2. B. R. in the Case of Oaky v. Sell.—3 Keb. 361. pl. 36. Oakes v. Cell, S. C. & S. P. held per Cur. accordingly.—Mod. 111. pl. 6. Wild said, that a sheriff's bond for ease and favour was void at common law, and that so it was declared in Sir John Lenthall's Case.

It seems that debt lies upon this statute against the sheriff, for letting to farm his county to his under-sheriff, excepting only one hundred, if such lease be by deed. See Br. Grants, pl. 59. cites 21 H. 7. 36.

W. being prisoner in Ludgate upon a capias utlag. in detinuc. T. the gaoler took an obligation of him, and 2 sureties, with condition to save him harmless, and to discharge his

fines, and to

render his body at any time upon a summons, &c. And in a debt brought upon the obligation against one of the sureties, he pleaded the conditions performed, upon which the plaintiff demurs, and holds an insufficient plea. D. 118. b. pl. 1. Mich. 3 Mar. Thrower v. Whetstone.

An *assumpsit* made to the sheriff contrary to the statute, is an obligation. Cro. E. 178. pl. 9. Pasch. 32 Eliz. B. R. in Case of Debridgecourt v. Smalbrooke.

In *assumpsit*, the plaintiff declared, that whereas he had taken the body of H. in execution at the suit of J. S. by virtue of a warrant to him directed as special bailly, the defendant in consideration that he would permit him to go at large, promised to pay the plaintiff all the money in which H. was condemned; it was the opinion of the Court that this consideration was not good, being contrary to the statute. Cro. E. 197. pl. 22. Mich. 32 & 33 Eliz. B. R. Fetherstone v. Hutchinson.

An information was exhibited against L. under-sheriff to Sir G. P. sheriff of York, upon the statute 23 H. 6. and it was shewn, that he being under-sheriff, a ca. sa. was delivered to him to arrest one P. L. upon a judgment for 103 l. the defendant colore officii took of the plaintiff 30 s. for making of a warrant upon this writ against the form of the statute, whereby he hath forfeited 40 l. The Lord Hobart inclined that this making the warrant upon the ca. sa. and the taking of 30 s. is within this statute, and he resembled it to DIVE AND MANNIGHAM'S CASE in Plowden, where an obligation taken of one in execution is void by this statute; the clause in this statute for the obligation is absolute, without any restraint, but that all obligations taken by colour of his office, with any other conditions, are made void. [The book says further, viz. This taking of 30 s. for making of a warrant upon a ca. sa. is extortion at the common law, for which he may be indicted, but whether it be within this statute or no, is doubtful. Hutt. 70. Mich. 21 Jac. Lingley's Case.]

Debt on a sheriff's bond, *that the defendant shall be a true prisoner; the defendant without pleading the statute pleaded that he was in execution for debt, and that the bond was given for ease and favour, and to obtain his liberty without satisfying the plaintiff in that action; upon demurrer it was held by Hale Ch. J. that the statute 23 H. 6. is a general law, of which this Court must take notice, without pleading it; but if it was not, yet the bond is void at common law, sed adjournatur.* 2 Lev. 103. Pasch. 26 Car. 2. B. R. Okey v. Sell.——3 Keb. 320. pl. 8. Oaks v. Cell, S. C. adjournatur.——Ibid. 361. pl. 36. Mich. 26 Car. 2. B. R. the S. C. [ 450 ] & S. P. and per Cur. the plaintiff should traverse the case, and can never maintain this demurrer, and judgment for the defendant, nisi.——See tit. Actions, (T) per totum, several cases upon this statute.

Par. 5. *And that the said sheriffs, and all other officers and ministers aforesaid, shall let out of prison all manner of persons by them, or any of them arrested, or being in their custody by force of any writ, bill, or warrant, in any action personal, or by cause of indictment by trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, bills, or warrants shall require.*

Serjeant at arms to the house of commons is not an officer within the 23 H. 6. for that extends only to officers who have the execution

and return of ordinary process of the law; per Hale Ch. J. and the whole Court. Lev. 209. Pasch. 19 Car. 2. in the Exchequer, Norfolk v. Elliot.——Raym. 62. Mich. 14 Car. 2. B. R. Norfolk v. Aylmer, S. P. adjournatur. \* 2 Salk. 609. pl. 1. 5 W. & M. in B. R. says, this statute says, that the sheriff may take bail; but that this is construed (shall), for he is compellable to do so; for where a statute directs the doing of a thing for the sake of justice or the public good, the word (may) is the same as the word (shall.)

Par. 6. *(Such person or persons which be, or shall be in their ward by condemnation, execution, capias utlagatum, or excommunicatum, surety of the peace, and all such persons which be, or shall be committed to ward by special commandment of any justices, and vagabonds refusing to serve according to the form of the statute of labourers, only excepted.)*

Par. 7. *And that no sheriff, nor any of the officers or ministers aforesaid, shall take, or cause to be taken, or make any obligation for any cause aforesaid, or by colour of their office, but only to themselves, of any person, nor by any person which shall be in their ward, by the course of the law, but by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the said writ, bill, or warrant, and in such places as the said writs, bills, or warrants shall require.*

One who was taken for suspicion of felony was bound in a single obligation to the sheriff, which had no condition, nor was the sheriff named

sheriff therein, and because in this case he is imprisoned colore officii, the sheriff being to keep felons in ward, and he was mainpernable therefore by failure of the condition, and of the word (sheriff) the justices held the obligation void by this statute. Br. Obligation, pl. 37. cites 37 H. 6. 1.——Br. Dette, pl. 115. cites S. C.

In debt on a bail bond, plaintiff declared generally as upon other bonds, viz. that the defendant bound himself to them in so much money, without saying per nomina vicecomitum civitat. London, as usual. The defendant prayed generally of the bond and condition, and made the entry in the usual form, (viz.) petit auditum scripti obligatorii predicti. & ei legitur, &c. petit etiam auditum conditionis scripti illius, & ei legitur in hæc verba. Then he pleaded the statute 23 H. 6. against sheriff's bonds, &c. and sets forth an arrest &c. and that this bond was taken for ease and favour. The plaintiffs perceiving their mistake of omitting per nomina vicecom. enter upon the record the defendant's praying over of the bond, &c. and then they set forth the bond as well as the condition thereof, & petunt quod script. præd. irrotuletur, & irrotulatur in hæc verba; by which it appeared, that it was taken by them by the name of sheriffs of the city of London, in express words as usual. Then they reply and confess they were sheriffs of London, &c. and the arrest, &c. and the bond was taken by them per nomina vic. civitat. London sub conditione predicta, to discharge the party

from the arrest, *absque hoc*, that it was taken for ease and favour; and upon a demurrer to this replication, it was held per Cur. that notwithstanding the defendant had entered the oyer of the bond with an &c. only, (*viz.*) & *ei legiatur*, &c. yet the plaintiff might enter it at large on the record, and by so doing he had avoided the defendant's plea of the statute, because now it appeared on record, that the bond was taken by the plaintiffs by the name of sheriffs, &c. and that the variance between the bond and the declaration was not material; neither was it any departure in the replication to say, it was taken by them per nomina vic.; so the plaintiffs had judgment. Carth. 301, 302. Pasch. 6 W. & M. in *B. R. Abney and Hedges sheriffs of London v. White*.

It is a good bar in debt that the bond was taken by the

Par. 8. *And if any of the said sheriffs, or other officers or ministers aforesaid, take any obligation in other form by colour of their offices, that it shall be void.*

sheriff colore officii, and that he is not named sheriff, and that the obligation has not a condition, secundum formam statuti, and so void by the statute; quod nota. Br. Dett. pl. 115. cites 37 H. 6. 1.

[ 451 ] If a sheriff takes a bond for a point against 23 H. 6. and also for a debt due, the whole bond is void; for the letter of the statute is so; per Cur. Hob. 14. Trin. 12 Jac. in Case of Norton v. Simmes.

The common law was very rigorous as to the execution of process; the capias was *ita quod habeas* the body at the day of the return, and if the sheriff had arrested one, it had been an escape to let him go. Before the making of this statute the sheriff usually took sureties for the appearance of the prisoner, and by this means used great extortion, and took great sums of money; to prevent which mischief this statute was made, and so designed; 1st for the ease of the prisoner, the sheriff being now compellable to take security, which he was not obliged to do before. 2dly. To prevent extortion, and therefore directs that a bond shall be taken in such manner, and with such conditions as is therein mentioned; per North Ch. J. 2 Mod. 180. Trin. 28 & 29 Car. 2. B. R. in Case of Ellis v. Yarborough.

An obligation made to a deputy of a bailiff

Par. 9. *And that he shall take no more for the making of any such obligation, warrant, or precept by them to be made, but 4 d.*

of a franchise, or to an under-sheriff's deputy, is void, by 23 H. 6. for it ought to be in the name of the bailiff or sheriff himself. Noy 69. Tavernor's Case.

Par. 10. *And also that every of the said sheriffs shall make yearly a deputy in the King's courts, of his Chancery, the King's Bench, the Common Pleas, and in the Exchequer, of Record, before that they shall return any writs to receive all manner of writs and warrants to be delivered to them.*

Par. 11. *And that all sheriffs, under-sheriffs, clerks, bailiffs, gaolers, coroners, stewards, bailiffs of franchises, or any other officers or ministers which do contrary to this ordinance in any point of the same, shall lose to the party in this behalf endamaged or grieved, his treble damages.*

Debt was brought in London by a common informer on this statute against a bailiff, for

Par. 12. *And shall forfeit the sum of 40 l. at every time that they or any of them do the contrary thereof in any point of the same, whereof the King shall have the one half, to be employed to the use of his house, and in no otherwise, and the party, that will sue, the other half.*

taking 5 s. 6 d. for arrest on a bond. After verdict for the plaintiff it was moved, that it ought to be brought in the proper county by the statute 21 Jac. cap. 4. or otherwise that statute will be avoided, the offence in this case being committed in Buckinghamshire; and said that it was so adjudged Pasch. 27 Car. 2. in Case of Nichols v. Cockerill; sed adjournatur. 4 Mod. 225. Trin. 8 W. 3. Newnham v. Lunn. Comb. 370. Newman v. Lun. S. C. Holt Ch. J. said it was adjudged in the Case of Barnes v. Ewes, that debt lies in this court, and that it was since so adjudged in the Exchequer; that indeed my Ld. Hale adjudged it otherwise in Nichols's Case and said that it is not yet settled. Et adjournatur.

Par,

Par. 13. *And that the justices of assises in their sessions, justices of the one bench and of the other, and justices of peace in their county, shall have power to inquire, hear, and determine of office without special commission, of and upon all them that do contrary to these ordinances in any article or point of the same.*

Par. 14. *And if the said sheriffs return upon any person, cepi corpus, or reddidit se, that they shall be chargeable to have the bodies of the said persons at the days of the returns of the said writs, bills, or warrants, in such form as they were before the making of this act.*

See tit. Return (R) pl. 8. and the notes there.

S. 2. *Provided always, that the warden of the King's gaol of the Fleet, and of the King's palace of Westminster for the time being, shall not be endamaged nor prejudiced by this ordinance in the duty of his office.*

For more as to this statute, see letter (F), and several other divisions under this head.

## (F) Securities given to Officers. Good or not [ 452 ] by the Statute of H. 6. &c.

1. THE sheriff took a bond of the defendant, being in custody, to appear on such a day in B. R. and also *ad tunc & ibidem ad respondendum the plaintiff in placito transgressionis*, &c. It was objected that the statute 23 H. 6. requires only a bond for appearance, and not to answer the plaintiff in a plea of trespass, which is another thing, and therefore the bond must be void; but adjudged that the bond was good, for there was *nothing in it but what was comprised in the writ*; for that was to command the sheriff quod habeat corpus of the defendant, &c. such a day ad respondendum to the plaintiff. Godb. 136. pl. 160. Pasch. 23 Eliz. Anon.

2. The condition of a bond to the sheriff, on arrest on a latitat, was, That if the defendant personally appear in B. R. at Westminster, and there to answer, &c. It was moved that this differed from the form in the statute, and therefore void; but as to the word (personally) the justices held it surplusage, and well enough, notwithstanding that because as the case is, the appearance of the defendant ought to be in person upon a latitat, for he is supposed to be in custodia marischalli, and so it has been adjudged in C. B. where the appearance of the party arrested is de jure personal, &c. Contra where personal appearance is not requisite. And as to the other words (there to answer), Wray put a difference that in such case the bond is well enough; for it is in effect only, that he shall appear eo animo ut respondeat; but if the words had been (appear and answer), it is a void condition; for it may be the plaintiff will never declare against him; but Gawdy and Ayliff J. e contra, and held the bond void by reason of the words aforesaid, but would not give judgment against the plaintiff; but ex gratia Curie sus-

The condition was as here, and the defendant pleaded the statute, and the bond was adjudged void. Cro. E. 672. pl. 37. Pasch. 41 Eliz. C. B. Scryven v. Dyther.— But where one was arrested upon a latitat, and gave a bond conditioned personally

to appear, *ferred him to discontinue.* 2 Le. 78. pl. 103. Pasch. 26 Eliz. *it was re-* Sackford v. Wolverston.  
*solved that*

*in regard*

*his appearance was necessary to put in special bail, if the party requires it, the bond was therefore good, and that it was ruled between Woolverston and Sackford; and of that opinion was the Court here, but they would advise.* Cro. E. 776. pl. 7. Mich. 42 & 43 Eliz. B. R. Bolles v. Hewitt.

3. A man was *bonded to his creditor, who was not sheriff nor sheriff's officer, to appear at his suit in B. R. on such a day, and then and there make answer, &c.* but did not appear. All the judges agreed clearly, that this bond was not within the statute 23 H. 6. and gave judgment for the plaintiff accordingly. Goldsb. 66. pl. 9. Mich. 29 & 30 Eliz. Raven v. Stockdale.

*Goldsb. 54.*  
*pl. 6. S. C.*  
*adjournatur.*

*—Ibid.*

*61. pl. 27.*

*S. C. An-*

*derfon held*

*the obliga-*

*tion void,*

*because*

*there is an*

*express form*

*limited by*

*the statute,*

*and this varying*

*from the form in substance,*

*is void; for in his opinion he excludes the party from*

*his advantage given him by the statute. But all the other justices held opinion against him; for they*

*said that a man ought to appear in proper person upon a latitat; which Anderson*

*denied, and said that the latitats are not but of 60 years continuance, which the other day*

*Periam had affirmed, and he seemed to dislike the latitats. Anderson said, all my brethren are of opinion*

*against me, wherefore take your judgment accordingly; and so judgment was entered for the plaintiff.*

*[ 453 ]*

*Debt upon*

*bond condi-*

*tioned, that*

*if the de-*

*fendant*

*should ap-*

*pear at the*

*next county-*

*court, to be*

*held, &c. to*

*prosecute his*

*action with*

*effect against*

*J. S. for wrongfully taking and detaining his cattle, &c. and to make return thereof, if a re-*

*turn should be adjudged by law, and also shall indemnify the sheriff, &c.* The defendant pleaded

*that this bond was taken colore officii, and not warranted by the statute; for the condition was to in-*

*demnify the sheriff. Upon demurrer it was held good per tot. Cur. because the condition was accord-*

*ing to the usual practice.* Lutw. 686. Mich. 9 W. 3 Blackett v. Cristop.

*Cro. E. 862.*

*pl. 38. S. C.*

*The statute*

*is that obli-*

*gations ta-*

*ken in any*

*other form*

*than is there*

*prescribed,*

4. Debt on a bond to a sheriff, that *if the defendant did personally appear in B. R. &c. that then, &c.* The defendant pleaded that he was taken by a *latitat* by the plaintiff (sheriff), who took this obligation for his deliverance, and that the obligation was not according to the statute. All the justices, except Anderson (who was absent), held that if it were in such an action where a man may appear by attorney, it is void. At another day it was held by three judges against Anderson Ch. J. that *a man ought to appear in person upon a latitat.* Ow. 90. Hill. 29 Eliz. Laffell's Case.

5. K. an officer by process out of the county court, *attached the goods of the defendant to answer a plaint levied there for a debt. K. re-delivered the goods, and took the defendant's bond to appear at the day, or otherwise to deliver the goods back again.* It was agreed per tot. Cur. that this was out of the statute of 23 H. 6. because that relates only to those whose bodies are taken and imprisoned, and not where their goods are attached; and judgment accordingly. And. 267. pl. 274. Trin. 33 Eliz. Burgoigne v. Kerry.

6. In debt upon bond, the defendant *pleaded that the plaintiff was sheriff, and took the bond upon arrest for the enlargement of the prisoner,* and that where the statute appoints the sheriff to take bonds of persons sufficient, the defendant said that himself was not sufficient, because *no freeholder*, and demanded judgment of the obligation. Upon demurrer the plea was held ill, because the *sheriff is the judge of the sufficiency*, and insufficiency is to his own damage

*for wrongfully taking and detaining his cattle, &c. and to make return thereof, if a return should be adjudged by law, and also shall indemnify the sheriff, &c.* The defendant pleaded that this bond was taken *colore officii*, and not warranted by the statute; for the condition was to indemnify the sheriff. Upon demurrer it was held good per tot. Cur. because the condition was according to the usual practice. Lutw. 686. Mich. 9 W. 3 Blackett v. Cristop.

Cro. E. 862. pl. 38. S. C. The statute is that obligations taken in any other form than is there prescribed,

damage only, he being to be amerced for not bringing in the body, and has no remedy besides the bond. Mo. 636. pl. 875. Hill. 37 Eliz. Cotton v. Wale.

shall be void for this cause; the first is, that it be made

to the sheriff himself; 2dly, That it be made by the name of his office; 3dly, That it be only for appearance at the day; but here the sufficiency of the surety is matter, and not form, wherefore it was adjudged for the plaintiff.——2 And. 175. pl. 97. S. C. & S. P. held accordingly by 3 justices; but the reporter says, nota the case supra, and quere.

7. The sheriff took a bond to appear at Westminster. The term was adjourned to St. Alban's, and the defendant appeared there. The bond is not forfeited; but Popham Ch. J. was of opinion that the bond was void, because of the word (*Westminster*) in the condition; for there is no such name in the writ for appearance. Mo. 430. pl. 601. Hill. 38 Eliz. Corbet v. Downing. In the report of the case there is a quere, whether the bond had been forfeited if he had appeared at Westminster, and not at St. Alban's. Ibid.——Cro. E. 466 (bis) pl. 16. Hill. 38 Eliz. B. R. Corbet v. Cook, S. P. and seems to be S. C. and it was held that the obligation shall always relate to the day and place comprised in the writ, because that shall have regard to the adjournment; and yet if the term be adjourned he ought to appear in B. R. or otherwise shall forfeit his bond.

8. A sheriff brought debt upon bond conditioned, that if H. L. should personally appear before the Queen's majesty and her council of her Court of Requests, &c. forthwith to answer all contempts as shall be then laid to his charge, that then, &c. The defendant pleaded the statute 23 H. 6. and that the sheriff colore præcepti under the seal of the Queen of the Court of Requests, took and imprisoned the said H. L. and detained him till the defendant and the said H. L. became bound as aforesaid. And upon demurrer it was adjudged for the defendant, because the bond is void by that statute. 2 And. 122. pl. 66. Mich. 40 & 41 Eliz. Stepneth v. Loyd, Cro. E. 646. pl. 58. St-pney v. Loyd, S. C. and Anderson and Glanville held that the process was no warrant to the sheriff to take the body, nor the obligation; for that

court had no power by the statute, nor by the common law, and though it was alleged that this obligation is within the statute, in regard the sheriff took it colore officii, although he was not lawfully in custody, it was notwithstanding adjudged for the defendant, and they held that the statute intends only obligations taken by [of] such as are in their custody by the course of law, and consequently this obligation was taken by duress, and so avoidable.——4 Inst. 97. cap. 9. [ 454 ] S. C. says it was adjudged upon solemn argument, and that the arrest was false imprisonment.

9. In case the plaintiff declared that he sued forth a latitat, and delivered it to the sheriff to arrest J. S. and acquainted the sheriff of his cause of action, and that he intended to declare in debt, and that he did arrest him, and afterwards let him go, absque aliqua securitate inventa; and at the day returned cepi corpus & paratum habeo, &c. which was false, &c. The defendant pleaded that J. S. being arrested, put in sureties for his appearance J. N. and J. D. two sufficient persons in the county, who were bound to him in 40 l. &c. and pleaded the statute, and that by reason thereof he let him at large, absque hoc that he let him at large without any security found, prout, &c. Adjudged that the traverse was good, and that the statute commands him to let the prisoner go upon bail, and he is compelled to take bail, but their sufficiency is left to his discretion; and though the return was false, viz. paratum habeo, when he was at large, yet that is but a contempt to the Court, and finable; but the party shall take no advantage

advantage of such return. Cro. E. 624. pl. 5. Mich. 40 & 41 Eliz. B. R. Barton v. Aldworth.

10. Debt upon bond of 40 l. the defendant pleaded the statute 23 H. 6. that he was arrested at the suit of J. S. and that he together with one M. gave this bond for his appearance, when *neither of them had any thing in the county, or were inhabitants therein*, and so the bond void; but all the Court held that it was good, for *the statute doth not make any bonds void, but those which oppress the people*, and if the sheriff takes bond with one surety it is good enough. Cro. Eliz. 852. Mich. 43 & 44 Eliz. B. R. Blackbourne v. Michaelbourne.

11. In an action of debt upon an obligation dated 25th Sept. the defendant pleads that *ca. sa. was awarded against B. who was taken upon it the 30th of Sept. and that obligation was made for the enlargement of B.* The plaintiff demurred, and had judgment, because it appears that the obligation was made before the arrest, and therefore it could not be avoided by 23 H. 6. cap. 10. but he ought to have pleaded it with a *primo deliberat after the arrest*; and it was agreed by Yelverton and Fenner, that if a *capias* be awarded against B. and before the arrest the sheriff takes an obligation of him for his enlargement when he shall be arrested, that by special pleading it may be avoided by 23 H. 6. Noy 43. Collins v. Phillips.

12. A *capias* was directed to the sheriff to arrest G. R. to answer the plaintiff in *placito debiti* of 300 l. the condition of the bond of appearance was to answer the plaintiff in *placito debiti* only (leaving out the 350 l.) upon an action of debt brought by the sheriff on this bond, and a demurrer, it was adjudged, that the bond and condition were good, for the statute 23 H. 6. does not prescribe any strict form, but that it ought to be made to the sheriff by his name of office, and to express the day and place of the appearance, and though it vary in other circumstances, it is not material, neither doth the statute restrain him to any sum or security, though generally 40 l. hath been held sufficient to excuse him for an escape, yet that is left to his discretion. Cro. J. 286. pl. 2. Mich. 9 Jac. B. R. Villiers v. Hastings.

13. Upon a *feri facias* the sheriff took a bond to pay the money in court at the return of the writ, and this was adjudged good, for the statute extends only to such bonds which are made when the defendant is in custody. 10 Rep. 99. b. Mich. 10 Jac. Bewfage's Case.

14. A bond was made to Neale who was sheriff of Warwickshire, and it was *vicecomiti com. predicti. and Warwick was in the margin*; per Doderidge, this was held no good bond, for he ought to be named sheriff, and of that county. 2 Roll. Rep. 365. Trin. 21 Jac. B. R. Neale v. Cowper.

[ 455 ] 15. In debt upon a sheriff's bond for an appearance, the name of the county was wrote in the margin, and the bond was made to N. vic. in com. perdit. &c. instead of *predicti*. The Court held that this was not a good bond, because it did not appear



pear to whom it was made; for it does *not appear that N. was sheriff of the county*; for perdit. is not prædict.; but if it be so taken, yet there is no county named before, and the bond ought to be made to the sheriff, who *should be named as sheriff, and of what county*. Palm. 378. Trin. 21 Jac. B. R. Noel v. Cooper.

16. Debt on a bond of 200 l. The defendant pleaded the statute 23 H. 6. and that the plaintiff was a serjeant at arms attending on the council of the marches of Wales, and took the bond under colour of an attachment out of the said court, and so void. It was insisted for the plaintiff that he was not an officer intended by the statute, which extends only to sheriffs, bailiffs, and other ministers, and keepers of prisons; besides the council is a court of a later erection, and the Court seemed to be of that opinion; but because the plaintiff made the arrest out of the marches, viz. in London, which is out of the jurisdiction, therefore this obligation is out of the statute, and so judgment for the plaintiff. Cro. C. 309. pl. 10. Pasch. 9 Car. B. R. Johns v. Stratford.

17. A bond given to appear upon an attachment out of Chancery is within the statute 23 H. 6. Per Roll Ch. J. Sty. 234. Mich. 1650. Burton v. Low.

In debt on a sheriff's bond, the defendant pleaded the

statute of 23 H. 6. and that an attachment issued out of Chancery against him, by which the plaintiff (then sheriff) was commanded to have the defendant coram Rege in Cancellaria in quinden. Pasch. ubique, &c. virtute cujus the defendant was taken and detained, till he gave the bond and condition pro easiamento & favore, which the plaintiff took colore officii, and so void by the statute; upon demurrer it was insisted for the defendant, that an attachment out of the Chancery was not within the words of the statute; but the Court inclined that attachments out of Chancery were within the statute, and that it was the constant practice for sheriffs to take bail in such cases; then it was objected that the writ was for the defendant to appear coram Rege in Cancellaria apud W. sm. &c. and the condition of the bond was to appear coram Rege in Cancellaria apud W. sm. instead of ubique as the writ is; but it was held that though such bonds have been held void, yet of late the courts have not been so strict upon the wording these conditions. 2 Vent. 237. Mich. 2 W. & M. in C. B. Lawton v. Haddock.

18. It was questioned heretofore, if a serjeant at arms of Wales were within the statute; but it has been since ruled that he is not. Per Roll Ch. J. Sty. 234. Mich. 1650. in Case of Burton v. Low.

19. Sufficiency of bail taken by the sheriff is not traversable; for the bail is only for the sheriff's security to save him from amercements; for by the stat. 23 H. 6. he is bound to let the party to bail by sufficient mainpernors; and the statute was made for the ease of the subject that he might be let to bail, which sheriffs refused to do before. But then the statute provides for the security of the sheriff, that he shall take reasonable sureties; and yet if he takes one surety, it has been adjudged sufficient. Lev. 86. Mich. 14 Car. 2. B. R. Bentley v. Hore.

Sid. 96. pl. 24. S. C. held that neither the place where the bail was taken, nor the sheriff's intention to deceive the plaintiff of his debt, by taking of in-

sufficient bail, as alleged, is not traversable.

The sufficiency of the bail is not material, it is only for the sheriff's own security. If he takes no bail at all an action lies against him, for then he does not act by colour of this law; per Cur. and by Atkins, the statute is not advantageous to the plaintiff at all, unless the sheriff lets go the prisoner without taking any bail, and then he must render treble damages. Mod. 288, 289. pl. 17. Trin. 28 Car. 2. C. B. in Case of Ellis v. Yarborough. 2 Mod. 177. S. C. and judgment per tot. Cur. for the defendant, and if the sheriff takes bail, and the defendant does not appear, the sheriff is no otherwise chargeable than by amercements.



whose suit, &c. are all well expressed as they should be, and the *ac etiam* is not of the substance of the writ, but only declares the intention how he will declare, and is grounded on the 13 Car. 2. Resolved, that the bail bond was good in the principal case, and judgment for the plaintiff. 2 Show. 51. pl. 38. Pasch. 31 Car. 2. B. R. Gardiner v. Dudgeate.

29. The bail bond to the sheriff is to make the party appear according to the writ, and not according to the condition of the bond; and the bail are by virtue of the bond engaged that he shall answer according to this writ, if it require special bail, either to render him, or to give special bail, which if he does not, they will not file his appearance, but sue the bail bond, and the bail cannot plead to it, *quod comperuit ad diem*; for it is no appearance till filed. This is the constant practice of the Court; every bail ought at his peril to see and take notice of the writ before he be bound, and thereby he may know what it is he engages for; if he do otherwise, he is bound to do he knows not what, and he must suffer for it; agreed per Cur. 2 Show. 51. pl. 38. Pasch. 31 Car. 2. B. R. in Case of Gardner v. Dudgeate.

30. Debt upon a sheriff's bond to appear *Die Luna prox. post Octab. Pur.* &c. The defendant pleaded that *Hilary term this year ended Die Sabbati prox. post Octab. Pur.* and that no court was held at Westminster *Die Luna prox. post Octab. Pur.* so that he could not appear, &c. and upon demurrer the plaintiff had judgment, because the condition being impossible at the time of making the obligation, the obligation is single; but the reporter adds a nota, that he did not plead the statute 23 H. 6. for if he had pleaded it, an obligation without a condition, or with an impossible condition (which is all one), it had (perhaps) been void by that statute. 3 Lev. 74. Mich. 34 Car. 2. C. B. Graham v. Crawshaw.

31. On a joint bill of Middlesex against 3, with an *ac etiam super scriptum obligatorium*, by them jointly and severally; the sheriff took one bail bond for the appearance of them 3, and there being no appearance, the plaintiff took an assignment of the bond, and now would have had the sheriff amerced. It was agreed, that the bail bond was not according to the statute, being for a joint appearance to several actions. 6 Mod. 122. Hill. 2 Ann. B. R. [ 459 ] Grovenor v. Soame.

## (G) In what Actions.

1. IF one condemned by false verdict in debt or damages sues an attaint, he shall have a special writ to bail him, upon sureties taken that if the attaint pass against him he shall render himself to prison, or satisfy the debt. F. N. B. 206. (D.)

So if one in execution for trespass brings attaint, he shall be bailed.

ed; and so he was in C. B. after some doubt, because no precedent was to be found thereof in that court, though it was common in B. R. D. 193. a. b. pl. 29. Mich. 2 & 3 Eliz. Kempe's Case. F. N. B. 106. (D) in the new notes there (a) cites S. C. but that some held, that a writ should be sent

sent to the warden of the Fleet to have the prisoner in court, *quolibet die pendente placito*.——A case cited in D. *ibid.* to that purpose is, *Pasch. 16 E. 3. 6.*

In such case the Court does not usually bail him, because the verdict is intended true till reversed; but sometimes the justices upon good consideration will bail him; per *Wray. Cro. E. 5. in pl. 4. Pasch. 24 Eliz. B. R.*

Sheriff may take a bail bond of one taken on an attachment 2. One taken on an *attachment* issued out of the Chancery is notailable, and such bond is void; per tot. Cur. clearly. 3 *Le. 208. pl. 269. Mich. 30 Eliz. C. B. Bland v. Riccards.*

ment for a contempt; agreed per Cur. *Ld. Raym. Rep. 722. Hill. 13 W. 3. the King v. Daws.*——2 *Salk. 608. pl. 1. S. C. accordingly.*——12 *Mod. 579. 8. C. & S. P. admitted.*

See *Vent. 234.* where such attachment went, and the sheriff took bond, which was held void, because the condition to appear was coram Rege in Cancellaria ubicunque, &c. apud Westmonasterium. And because of the addition of Westminster the bond was held void; cited per *Hale Ch. J. as adjudged. Mich. 1649. in Case of Button v. Low.*——2 *Vent. 237, 238. Mich. 2 W. & M. in C. B. Lawton v. Haddock,* the Court inclined, that attachments out of Chancery are within the statute of 23 H. 6. and said, that it is the constant practice for sheriffs to take bail in such cases.

In an *attachment of privilege*, which is a *capias* in the 1st process, they hold to bail for any sum, though never so small; for an attachment of privilege being a *capias* in the first process without a summons, does not arise from a supposition of a nihil returned, and that there are no issues to answer the debt; but this process arises from a debt due to the officers of the court by the acts of the court, and therefore another officer ought not to appear without seeing a security given for such debt, and therefore they hold the defendant to bail in this case, though the debt be never so small. *G. Hill. of C. B. 30.*

On a demurrer the question was, whether the sheriff can take a bail bond upon an attachment for contempt out of this court. By the act of 13 Car. 2. a sheriff is not empowered to take bail, though the court or a judge may take a recognizance; it is true, persons taken by virtue of attachments out of Chancery for not appearing and answering, have been usually bailed, and the reason is, because the party upon entering his appearance, and paying the usual contempt, is discharged of course; whereas in this court the party is to appear in court *de die in diem*, and be examined on interrogatories to be exhibited against him, and it is not determined that a sheriff can take bail upon attachments out of Chancery, but rather doubted; and in the present case all the judges were of opinion, that no bail could be taken, and gave judgment for the defendant. *Rep. of Pract. in C. B. 14. Mich. 4 Geo. 1. Field v. Walford.*

Debt on a sheriff's bond taken on an attachment out of Chancery, upon a demurrer the question was whether the sheriff could take such a bond or not? The Court gave judgment for the defendant, and said, that a sheriff cannot take a bail bond upon any attachment for a contempt. *Rep. of Pract. in C. B. 100. Pasch. 7 Geo. 2. Waddington v. Fitch.*——*Barnes's Notes in C. B. 53. S. C. Judgment nisi, and no cause was shewn.*

*Ibid. 384. in pl. 5. Trin. 14 Jac.* 3. If an *audita querela* be grounded on a release or record, the party may be bailed; but not on a surmise of a matter in fact, as of B. R. Coke an arbitrement or usury; per Coke *Ch. J. Roll Rep. 133. in Ch. J. said, pl. 11. Hill. 12 Jac. B. R.*

that in the time of the Lord Dier and Wray, and in all his time, it had never been used to bail the party upon a matter in fact as upon the statute of usury and the like; for should he be bailed in such cases, then every man may be defeated of his execution; but if the party will shew a matter of writing in his discharge, then it has been used to deliver him to bail upon calling the other party, and asking him if he can deny it, &c.——Admitted per Cur. that plaintiff in *aud. quer.* may be bailed. *Sid. 286. in pl. 23. Pasch. 18 Car. 2. B. R.*

If the party that brings an *audita querela* be out of prison, the Court will bail him, though grounded upon a surmise of matter of fact, as payment, &c. but if he be in prison, then not, unless it be upon a speciality. *Vent. 46. Mich. 21 Car. 2. B. R. Anon.*

See tit. *Audita Querela* (E), pl. 17. and the notes there.

But he ought not to be bailed before the writ of withernam is returned. 4. A person taken in *withernam* upon a *homine replegiando*, upon pleading *non cepit*, may be bailed. 2 *Salk. 582. pl. 3. Mich. 12 W. 3. B. R. in Case of Moor v. Watts, cites Kelw. 71. a. F. N. B. 74.*

5. One taken in execution is not bailable by law, *unless* an *audita querela* be brought (Hill. 21 Car. B. R.), for bail is put in to secure the plaintiff that the defendant shall perform the judgment of the Court, and now the law hath determined that matter, and what remains now is only for the defendant to perform the judgment, and for the not performing it he lies in execution. L. P. R. 172.

One in execution for a fine is not bailable. 11 Mod. 59. pl. 36. Pasch. 4 Ann. B. R. Col. Layton's Case.

—And per Holt Ch. J. bail in case of execution was always refused. *Ibid.*

6. When the *action* is only for damages, there the party is not held to bail, *unless* in mayhem, or some notorious battery; and the reason is, there is no certain sum for which the caution can be ascertained; but in mayhem, and where by the injury it is apparent, that the damage will exceed the sum of 10l. there the judge may by special rule hold to bail. G. Hist. of C. B. 30.

7. On a *bottomry bond* for payment of money *inter alia*, the Court inclined to think the defendant should give bail. Rep. of Pract. in C. B. 34. Pasch. 13 Geo. 1. Defflower v. Tutt.

See (H) pl. 15. Bull v. Clifton.

8. The defendant had been arrested and held to special bail, and afterwards rendered in discharge of his bail, and the plaintiff proceeded against the defendant as a prisoner, and recovered a judgment. In action of debt brought upon that judgment, and the former bail being vacated by the render, the Court held that the plaintiff might well hold the defendant to bail in this action, he not now having bail in the first action. Rep. of Pract. in C. B. 77. Mich. 6 Geo. 2. Revel v. Snowden.

But now by a general rule, Hill. 8 Geo. 2. if a prisoner be discharged for want of prosecution, and afterwards is arrested by

action of debt on the judgment obtained in the cause, a common appearance shall be accepted. *Ibid.*

9. Motion in the Treasury for bail in an *action for mesne profits*, after a recovery in ejectment, upon the lessor of the plaintiff's affidavit that the mesne profits amounted to 89l. bail was ordered for 80l. This is a cause of action which is *bailable or not at the discretion of the Court or a judge*. Barnes's notes in C. B. 87. Mich. 13 Geo. 2. Hunt. v. Hudson.

## (H) Upon Writs of Error.

See tit. Ut. lawry (B. b.).

1. **I**N a writ of error brought in B. R. if the error is apparent, we use to bail the defendant; per Coke Ch. J. 2 Bulst. 164. Hill. 11 Jac. 1. cites 1 H. 7. 20. which he said is a very notable case.

But of error brought in parliament it is otherwise; for they cannot

bail the party there, by reason of the great delay that may be, it being uncertain how long or short a time the parliament will continue; per Coke Ch. J. 2 Bulst. 164.

2. Error was brought of a judgment in B. R. and it was moved [ 461 ] that the party being in execution might be bailed; but the Court held that they had no authority to do it, their authority being only

S. P. held that the can only



that an administrator who brings a writ of error shall not give bail, though he is not exempted by the statute, neither shall he pay costs.

8. W. was indicted and convicted of deer-stealing, &c. at the sessions, and brought error in B. R. It was moved to bail him till the error determined, but denied; for per Cur. though the plaintiff in audita querela may be bailed, yet one in execution who brings writ of error shall not. Sid. 286. pl. 23. Pasch. 18 Car. 2. B. R. The King v. Whitmore.

2 Keb. 43. pl. 88. the King v. Whitmore, S. C. says he must continue committed, else there would

be no remedy to bring him into custody, in case the judgment should be affirmed.

9. Persons in execution for a fine to the King brought hab. corp. and a writ of error, and assigned errors, and prayed to be bailed, but the Court would not; but it was said to be usual in the Crown-Office to bail in such cases. Sid. 320. pl. 10. Hill. 18 & 19 Car. 2. B. R. The King v. Marcul, &c. inhabitants of Limehouse.

S. P. & S. C. cited 11 Mod. 59. pl. 30. Pasch. 4 Ann. B. R. in Colonel Layton's Case, where

after precedent searched, Holt Ch. J. said he found the cases not put fair in case of execution, and said that bail in case of execution was always refused, and of this opinion were the whole Court now, and he was remanded.

10. Upon a writ of error brought in B. R. to reverse an outlawry in this court, the question was if bail ought to be put in before the allowance of it by the statute of 31 Eliz. cap. 3. and it was resolved that in all writs of error it ought, and so the words must be intended, or otherwise that part of the statute will be of no effect, if it should be extended only to cases where the error is for want of proclamation; for it doth not appear at the time of the allowance of the writ of error what errors the party will assign. Freem. Rep. 162. pl. 178. Trin. 1674. Elliot's Case.

11. Debt on bond. The condition was for payment of money and performance of covenants. Judgment thereupon, on which error was brought; and it was ruled that it is not within the statute 3 Jac. cap. 8. which requires bail to be put in cases of debt or contract. Comb. 105. Pasch. 1 W. & M. B. R. Garret v. Dandy.

Bond being conditioned for performance of covenants, bail ought not to be required on the writ of

error. Barnes's notes in C. B. 66. Mich. 10 Geo. 2. in Case of Spincks v. Bird.

12. One in execution upon a judgment for usury, brought a writ of error in B. R. and moved to be bailed, but it was denied, though there was an apparent error in the record, and though it was formerly the practice to bail in such case, for per Curiam we ought not to enlarge a prisoner in execution; but it is otherwise upon an audita querela, per Holt Ch. J. 3 Salk. 58. pl. 18. Pasch. 7 W. 3. Anon.

13. In debt upon a bail bond in C. B. judgment was given for the plaintiff, and error brought in B. R. and bail put in according to the statute and judgment affirmed, and thereupon error was brought in parliament; it was insisted that bail in this

8 Mod. 79. Trin. 8 Geo. 1. Colebrook v. Digg's, S. E.

where judgment was given in B. R. and afterwards affirmed in the Exchequer Chamber,

and then error brought in parliament, and held accordingly; and says that there is no inconvenience by entering into 2 recognisances, because by the late statute he has a proper remedy, if the plaintiff in the original action takes out execution for more than is due; but it would be very inconvenient for him to be delayed by a writ of error, and have no security for satisfaction for his loss.

case was not requirable by the statute 3 Jac. 1. but per Cur. the first recognizance does not include payment of costs to be assessed in the House of Lords, and therefore a new recognizance ought to be given within the intent of the statute. 1 Salk. 97. pl. 2. Hill. 1 Ann. B. R. Tilley v. Richardson.

14. Note, by the *statute of 3 Jac. 1. cap. 8.* when a writ of error is brought on a judgment had upon a bond to pay money (only) there special bail ought to be given; and after a year a scire facias ought to precede the levavi, or fieri facias. 11 Mod. 2. pl. 4. Pasch. 1 Ann. B. R. in a nota.

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See (G) pl. 7. Deffow v. Tutt.

15. In error brought on a judgment in *case on a bottomree bond*, it was moved that the plaintiff in error might put in special bail; Holt. Ch. J. said, this is not a bond only for the payment of money, for if he does not go the voyage, he forfeits the penalty; for his going the voyage, return, and payment of the money, are all conditions; and inclined, that it did not require special bail; sed adjournatur. 11 Mod. 260. pl. 16. Mich. 8 Ann. B. R. Bull v. Clifton.

16. Sheriff brought *debt upon bond*, and judgment was had by *nil dicit without oyer of the condition*, and a writ of error was brought upon the judgment, and a superseas taken out; it was moved to set aside the superseas, because the plaintiff in error had not put in bail, according to 3 Jac. 1. cap. 8. On the other side it was said, that the bond was for appearance, and so out of the said statute; to which it was answered, that it *appeared upon record to be an obligation for payment of money*, and that the Court must confine themselves to the record, and judge upon that only; but per tot. Cur. it was held that they ought to *examine into it by affidavit*, for otherwise the plaintiff in error would be obliged to put in bail contrary to the intent of the statute, because the declaration was only upon the penalty, without mention of the condition. MS. Rep. Mich. 12 Ann. C. B. Valentine (sheriff of Lancaster's) Case.

17. A. gave bond to B. conditioned that C. should pay B. 20 l. C. gave bond to A. reciting the bond given by A. to B. and then follows this condition, viz. *that if the money be paid by C. according to the condition of the said bond (given by A.) then this obligation to be void, otherwise &c.* A. brought action on the last bond, and had judgment, whereupon C. brings writ of error. The question was, whether special bail was to be put in by the plaintiff in error by the statute of 3 Jac. 1. cap. 8. Per Parker Ch. J. this bond stands only as a security for damages, and may be discharged without one penny paid to the plaintiff, and there is no difference between this bond and a bond to save harmless, and therefore out of the meaning of the act. And Pratt J. thought this

case,



case, though possibly within the words of this act, yet is out of the meaning of it, which is plainly this, viz. that where a recovery does necessarily import a debt due, there this act takes place, but not where a recovery may or may not import a debt due, and the reason is, that delay in the latter case is not esteemed so prejudicial as in the former; sed adjournatur. 11 Mod. 281. Hill. 1 Geo. 1. B. R. Hammond v. Webb.

## (I) Where Common, and where Special Bail. And necessary in what Cases.

1. *IN homine replegiando* the sheriff returned that the defendant claimed the plaintiff as villein; by which the counsel of the plaintiff was ordered to find surety to have him here at a day, and had writ to the sheriff to deliver him; but could not get the sheriff to take security thereof in the country. Quod nota. Br. Surety, pl. 4. cites 8 H. 4. 2.

*In homine replegiando the parties were an issue, if the plaintiff was villein of the defendant, or*

*frank*, and the plaintiff was compelled to find surety to sue with effect. Br. Surety, pl. 5. cites 11 H. 4. 15.

2. In *trespass* the defendant pleaded that the plaintiff was his villein regardant to his manor of E. &c. and they were at issue upon frank &c. and the plaintiff found 4 sureties to sue with effect &c. Br. Surety, pl. 6. cites 9 H. 5. 1.

3. In *false judgment* the plaintiff shall find surety to sue with [ 464 ] effect; *contra in writ of error*. Note the diversity, &c. Br. Surety, pl. 7. cites 9 H. 5. 1.

4. In an action brought upon the stat. 13 Eliz. of fraudulent conveyances, a rule was shewn by the justices that it was the practice in B. R. that in all actions brought upon *penal statutes* the defendant shall only put in common bail. Yelv. 53. Mich. 1 Jac. B. R. St. George's Case.

*On a penal statute the defendant is not held to bail, because the penalty on a statute is*

in the nature of a fine or amercement set on the party for an offence committed, and therefore no person ought to suffer any inconvenience by reason of such law, till he is convicted of such offence; for then the defendant would suffer [be liable to] an action of [for] a penalty before it ought to be set. G. Hist. of C. B. 30.

In all actions upon a *penal statute* common bail suffices; but when a *writ is special*, there cannot be common bail without *summoning before a judge*; per Holt. 12 Mod. 231. Mich. 10 W. 3. Anon.

5. After judgment for the plaintiff it was assigned for error that no bail was entered for the defendant. It was shewn to the Court that the attorney was dead, but had been paid his fees for entering it, and that this appeared by his own book; and the plaintiff prayed that the bail might be entered, and so it was by order of the Court in this case, and between other parties. Roll. Rep. 372. pl. 27. Pasch. 14 Jac. B. R. Denham v. Cumber.

*3 Bull. 181. S. C. and ruled per tot. Cur. that it be entered as of the same term in which it ought to have been entered,*

Ibid. it was said by Serjeant Moore, that judgment in such case was resolved to be erroneous in the case of *Ld. Chandois v. Sculler*.

Executors or administrators shall not find special bail, though the debt be for 3000 l. or more; for it is not their debt, nor shall their bodies be liable to execution for it. 2 *Brownl.* 293. *Hill.* 7 *Jac. C. B. Anon* —S. P. that they shall never find more than common bail. *Sid.* 63. pl. 34. *Mich.* 13 *Car.* 2. *B. R.* in a nota.

6. In *trespass against A. and B. verdict was for the defendants.* It was moved in arrest, for that *no bail was entered for B.* For every defendant is supposed to be in custodia mareschalli; and in this case the venire facias was to try the issue between the plaintiff and the defendants, whereas B. was no party in court, therefore he cannot have judgment, and it appearing that there was no fraud in the plaintiff, the judgment for this reason was arrested; but if B. had appeared at the suit of any other person in the same term, it had been sufficient. *Poph.* 145. *Trin.* 16 *Jac. B. R. Dennis v. Sir Arthur Manwaring.*

7. An executor, though sued by an attorney of B. R. shall not be compelled to put in special bail, notwithstanding his privilege as to other persons sued by him; and upon search no precedent could be found where such pretended privilege had prevailed. 3 *Bullst.* 316, 317. *Mich.* 1 *Car. B. R. Smale v. Warne.*

8. If, where special bail is required, the plaintiff's attorney doth (before any bail put in) deliver a declaration to the defendant's attorney (unless it be only to shew such a cause of action as requires bail), he shall not afterwards compel the defendant to put in good bail, but common bail shall serve. *L. P. R.* 86.

9. After the roll is marked to have special bail, common bail ought not to be filed; but if the roll be not marked for special bail, nor the cause of action expressed in the writ, common bail may be entered (*Hill.* 22 *Car. B. R.*); for nothing appears to the Court that special bail was required, and then common bail is to be filed of course. *L. P. R.* 174.

10. In case against baron and feme the feme appeared, but the baron would not; and bail being insisted upon, it was prayed that she might be delivered on common bail; but *Glyn Ch. J.* said that if there be cause to have special bail, she must lie in prison till the husband appears and puts in bail for her; for she cannot put in bail for herself, she being covert baron. *Sty.* 475. *Mich.* 1655. *Attlee v. Lady Baltinglass.*

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Special bail is only discretionary in covenant. 1 *Mod.* 30. *Mich.* 4 *W. & M. Anon.* —In d. b. upon a bond to perform covenants, no bail shall be given but with respect to the breaches, and the damage done thereby; but the measure of that shall be taken from the plaintiff's oath. 1 *Salk.* 100. pl. 11. *Hill.* 9 *W. 3. B. R. Anon.*

11. An executor of an executor brought debt upon bond for 2000 l. and upon motion that the plaintiff might accept common bail, because the bond was only for performance of covenants, the Court ordered that bail should be accepted according to the breach assigned, and not according to the penalty. It was held in this case, that where executors are defendants they need not find special bail, because in autre droit. *Sid.* 63. *Mich.* 13 *Car.* 2. *B. R. Boothby v. Buller.*

But special bail was de-

12. In *scand. magnatum* the Court upon motion ordered special

cial bail to be given. Raym. 74. Pasch. 15 Car. 2. B. R. The Earl of Stamford v. Goodall. med, and the Court said that in such case

bail is not requirable. 2 Mod. 215. Pasch. 29 Car. 2. C. B. Ld. *Dorchester's Case*.—11 Mod. 49. pl. 18. Pasch. 4 Ann. B. R. the Court said it was refused in Ld. *Wharton's Case*.—In action on the case for calling a person of quality *widore*, by which she lost her marriage, the defendant was ordered to find special bail. Lev. 39. Trin. 13 Car. 2. B. R. Anon.

13. The defendant shipped goods at *Brasil*, without paying the customs, but promised to pay them at *Lisbon*, but came to *England* directly without touching at *Lisbon*, and offering to sell the goods here, the *Portugal* ambassador complained to the privy council, and he still refusing to pay them, they committed him; and being brought by *habeas corpus* he moved to be bailed, but it was opposed, because it might cause a breach between the 2 crowns; but the Court inclined that he should be bailed, and if the matter could be proved, he might be indicted, but they prayed time to inspect the return before the filing it, and therefore he was remanded. Sid. 143. pl. 23. Pasch. 15 Car. 2. B. R. the King v. Indicalmois. An action was brought against the defendant for a ship and cargo, and the question was, whether the defendant should be discharged upon common bail. The cause came in

from London by *habeas corpus*, and therefore it was insisted, that special bail should be put in of course; but Holt Ch. J. held, they might examine into the cause of action, how it came thither by *habeas corpus*, and if it was such which required bail, though under 10l. they might make the defendant put in special bail; but if the action was vexatious, or such as required no bail, then they would discharge him upon common bail. It was urged for the defendant, that what he did with relation to the ship and cargo was as judge of the Admiralty in the West-Indies, and therefore no reason why he should be held to bail; but it appearing that defendant had the ship and cargo in his own custody, which was intermeddling further than his office warranted, for this reason he was held to bail. 1 Salk. 101. Pasch. 1 Ann. B. R. Lumley v. Quarry.

14. Case for affirming that he was of full age, and by that means had borrowed large sums on mortgages, when in fact he was under age; it was moved that he might put in special bail, but denied; for special bail shall not be given by virtue of the statute of 13 Car. 2. cap. 2. but where it was required to be given by the rules of the court, and the ac etiam will not compel special bail, unless the cause expressly appears to be for real value, as debt, trover, &c. but where special damages may arise, as in this case or other cases by reason of special declarations, special bail shall not be required. Sid. 183. Pasch. 16 Car. 2. B. R. Chetwin v. Venner.

15. On a motion to have a special latitat, viz. with an ac-etiam, where the party intended to declare in trespass only, and this was upon a surmise that there was a great mayhem, the Court said, that upon affidavit thereof they would make one with an ac-etiam, and so there shall be special bail. Sid. 276. pl. 4. Hill. 17 & 18 Car. 2. Anon.

The defendant being arrested upon a latitat, it was moved for special bail upon affidavit that the

cause of action was battery and wounding, and that the plaintiff had several wounds with a sword; it was at first doubted upon the statute of 13 Car. 2. cap. 2. but afterwards granted, nisi, &c. Sid. 307. Mich. 18 Car. 2. B. R. Roberts v. Slingsby. [ 466 ] Ibid. the reporter adds a note, that it seems the proper way had been to move for a special writ upon such an affidavit, and then they may require special bail.—It was moved in battery, for putting an arm out of joint,

joint, that the party might be held to special bail, but denied; and Twiddle J. bid them follow the course of the court. Mod. 2. pl. 5. Mich. 21 Car. 2. B. R. Anon.

16. *In all cases where process may issue forth to take the body of the person, if an appearance only and not bail is required, there every such person must upon an arrest cause common bail to be filed, which is an appearance upon record.* L: P. R. 85.

In the first writ he shall not be compelled to put in bail to the

17. *In account special bail is not required, but otherwise it is in debt on account; per Broom.* 2 Roll Rep. 53. Mich. 16 Jac. B. R.

action, yet in special cases by discretion of the Court, he shall find bail, and there are precedents so. Noy 28. Mich. 16 Jac. by all the prothonotaries, Green v. Dickenson.—In account no special bail is to be found, till judgment quod computet, and cites Noy 28. Lev. 300. Mich. 22 Car. 2. B. R. Reeves v. Gibson.—Ibid. says it was so ruled, 14 & 15 Car. 2. in Case of Lewis v. Bailey.—2 Keb. 335. pl. 64. Hill. 19 & 20 Car. 2. Lewis v. Bailey.—Vent. 103. Mich. 22 Car. 2. B. R. Anon. seems to be S. C. of Lewis v. Bailey, where the special bail was discharged, and said that if the plaintiff would have special bail, he must arrest the defendant again in an action upon the case. —12 Mod. 579. Mich. 13 W. 3. Cudmore v. Ellis, S. P.

Vent. 321.

Mich. 29

Car. 2.

B. R. com-

tra in Case

of Ent v. Withers.—Upon assets found, and a *devastavit* returned, and debt brought against the executor on the judgment, he ought to put in special bail; per tot. Cur. 2 Show. 55. pl. 41. Pasch. 31 Car. 2. B. R. Dingley v. Halse.

18. *In action of debt against the executors, upon the surmise of a devastavit, defendant was held to special bail, and so ruled upon motion.* Vent. 355. Trin. 33 Car. 2. B. R. Anon.

19. *Judgments in ejectment against casual ejectors for want of an appearance shall be set aside, and restitution granted, if no latitat hath been sued out against, nor common bail filed for, such casual ejector or nominal defendant, within fourteen days after such appearance.* Trin. 4 W. & M. per Cur. L. P. R. 85.

4 Mod. 192.

Hill. 9 W.

3. Anon.

The writ

and return

was brought

into court,

and a certi-

ficate from

the proper

officer, that

common

bail was

not filed within

8 days, &c.

20. *By the 5 & 6 W. & M. cap. 21. (and continued by 5 Ann. cap. 19. and made perpetual by 1 Geo. 1. cap. 12) it was enacted that for every piece of vellum or parchment on which any common bail to be filed, on which any bail shall be written, shall pay 6d. stamp duty, which appearance or common bail, the defendant shall cause to be entered or filed, within eight days after return of the process on which the defendant was arrested, upon penalty of 5 l. to be paid to the plaintiff, for which the Court shall immediately award judgment.*

and, &c. upon which a motion was made, and the Court gave judgment,

21. *In an action upon a replevin bond, common bail shall be filed.* 1 Salk. 99. Trin. 10 W. 3. B. R. the duke of Ormond v. Brierly.

22. *Action against master of a ship for embezzling goods he had on board, and he was held to special bail; but if it were for negligent keeping, common bail would have done; per Holt.* 12 Mod. 251. Mich. 10 W. 3. Anon.

23. Defendant shewed the *composition act*, and that the plaintiff's debt, according to the composition he had made with the rest of his creditors, was under 10l. and that the plaintiff would be bound, though a *non-subscriber*; yet the defendant was held to special bail, because non constat that the plaintiff will be bound, for he may deny the absconding &c. so that this would be to determine the merits of the cause, viz. that he was bound by the composition; aliter, if the plaintiff had subscribed, or had been *summoned before a judge*, and the matter had received a determination. 1 Salk. 99. pl. 7. Mich. 10 W. 3. B. R. Anon.

Lord Raym.  
Rep. 383.  
Mich. 10  
W. 3. Anon.  
S. P. and  
seems to be  
S. C. held  
[ 467 ]  
accordingly,  
and he may  
likewise deny  
that the  
subscribing  
creditors  
were real creditors.

24. In an action for *money won at play*, Gould & Turton were for denying special bail, for since the plaintiff played upon tick, they would not help his security; but per Holt, the practice has been otherwise, and the contract if under 100l. is lawful, and the plaintiff ventured his money against it, and to say they were not to better his security, would as well prove there should be no bail in an *indebitatus assumpsit* &c. 1 Salk. 100. pl. 10. Hill. 11 W. 3. B. R. Anon.

12 Mod. 296.  
Pasch. 11 W.  
3. Carrill v.  
Cockran, S.  
P. and seems  
to be S. C.  
accordingly,  
by Turton &  
Gould; but  
Holt Ch. J.  
said, they never  
ought to

enter into the merits of a cause upon a question about bail; for to order common bail upon merits would slur a man's cause of action, and no man ought to have his cause tried with disparagement upon it, and though this may be for money won at play, yet it was a lawful contract which the act of parliament allowed of, and no man ought to be wiser than the law; and this was giving money against money, for which *indebitatus assumpsit* would not lie, but an action upon the special contract, and to say that because he depended upon the defendant's word at first, he therefore should have no special bail, would be a reason why there should be no special bail in any simple contract, and here special bail was ordered; and it was said to be so ordered in like cases in the Common Pleas,

25. One *summoned before a judge, to shew cause* why common bail should not be taken, *did not come*, whereupon a day was given him for to come, or else that common bail should be; he *comes before the day*, and consents to common bail, which was accordingly filed; *and at the day came to make oath* of a debt above 10l. but per Cur. he ought not to be received, bail being regularly filed. 12 Mod. 324. Mich. 11 W. 3. Anon.

26. It was moved to have leave for the charging of M. being a prisoner in Newgate, with a *scandalum magnatum* & *ac-etiam* billæ of 100l. in order to hold him to special bail, for saying the D. of S. was a cheat, and had cheated the King and the army; Holt said, this being a poor man, to charge him thus will be a perpetual imprisonment to him, and special bail has been often demanded in these actions, yet it has been frequently denied; but he was ordered to find two that would swear themselves worth 25l. each, and himself to be bound in 100l. 12 Mod. 420. Mich. 12 W. 3. Duke of Schomberg v. Murrey.

27. It has been held once, that if the *plaintiff* had been *non-pressed in a former action*, that if he began again he should have but

but common bail, but this has not been abided by; per Cur, 12 Mod. 501. Pasch. 13 W. 3. Anon.

28. If *upon examination before a judge* one do not make out a good cause of action, common bail shall be ordered; per Holt Ch. J. 12 Mod. 526. Trin. 13 W. 3. Taylor v. Brudon.

29. If one has several causes of action, each whereof is too small for special bail, he cannot join them to enforce special bail; per Cur. 12 Mod. 527. Trin. 13 W. 3. Anon.

30. Per Holt Ch. J. when, upon contest about common or special bail, it does appear that the plaintiff has misconceived his action, and that if any action lies it is of another sort, there common bail ought to be accepted. 12 Mod. 579. Mich. 13 W. 3. Anon.

31. Where the plaintiff was nonsuit for want of a declaration, and afterwards brought another action for the same cause, Holt Ch. J. said, he had known it held by the Court, that he should have but common bail to the said action. Ld. Raym. Rep. 679. Trin. 13 W. 3. Almanson v. Davila.

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3 Salk. 56.  
pl. 5. S. C.  
ruled accordingly.  
—11 Mod.  
36. pl. 7.  
S. C. and

32. A prisoner for debt under 100l. was discharged by the justices pursuant to the late act, and afterwards was arrested for a sum above 100l. Ruled, upon conference of all the judges, that he must put in special bail. 6 Mod. 301. Mich. 1 Ann. B. R. Cragget v. Glover.

Holt Ch. J. conferred with the judges of C. B. and said it seemed doubtful, because of the words in the statute, viz. for any debt whatsoever. But then the proviso is to be considered, which is, provided that no man shall be discharged by virtue of this act if he stands charged and be indebted above 100l. Now it is objected that this shall be applied to the 1st discharge only; but he said, it ought to be applied to the 2d discharge as well as to the 1st, for he that is a 2d time discharged is as much discharged by virtue of this act, as he that is discharged the 1st time. Besides, it was the intent of the act, that no man shall be discharged that owed above 100l. nor can the discharge of the other debts be a discharge in this wherewith he never was charged.

Though generally in actions for words no special bail ought to be found, yet upon the circumstance of the case the Court may order it. Lev. 39. Trin. 13 Car. 2. Anon.

33. Special bail was denied in scandal, though the words were very bad, and implied treason. 11 Mod. 49. pl. 18. Pasch. 4 Ann. B. R. Sir William Drake's Case.

In debt on judgment pending a writ of error, the Court will

34. In debt brought upon a judgment in B. R. pending a writ of error in the Exchequer Chamber, bail never was allowed. 10 Mod. 16, 17. Hill. 9 Ann. B. R. per Cur. in Case of Goodwin v. Godwin.

discharge the defendant upon common bail; per Holt Ch. J. But Powel J. said, that it was anciently otherwise. 3 Salk. 55. Pasch. 4 Ann. B. R. Anon.

If bail be in the original action in case, and debt be brought on the judgment, no bail shall be required; but if no bail in the original action, but a writ of error is brought upon it, and then debt on the judgment, bail shall be given in the action of debt on the judgment, notwithstanding such writ of error. Comyns's Rep. 556. pl. 235. Trin. 9 & 10 Geo. 2. in Case of Wayman v. Wayman; cited per Mr. Townshend in a case where Ch. J. Eyre consulted Judge Tracy Hill. 13 Geo.

35. 12 Geo. 1. cap. 29. s. 1. No person shall be held to special bail

*bail upon any process issuing out of any superior court, where the cause of action shall not amount to 10l. nor out of any inferior court where cause of action shall not amount to 40s. And in all cases where the cause of action shall not amount to 10l. in a superior court, or to 40s. in any inferior court (and the plaintiff shall proceed by way of process against the person), he shall not arrest the body of the defendant, but shall serve him personally, within the jurisdiction of the court, with a copy of the process; and if such defendant shall not appear at the return of the process, or within 4 days after, it shall be lawful for the plaintiff upon affidavit being made and filed of the personal service of such process (which affidavit shall be filed gratis) to enter a common appearance, or file common bail for the defendant, and to proceed thereon, as if such defendant had entered his appearance, or filed common bail.*

36. S. 2. *In all cases where the plaintiff's cause of action shall amount to 10l. or 40s. as aforesaid, affidavit shall be made and filed of the cause of action (which affidavit may be made before any judge or commissioner of the court out of which such process shall issue, or else before the officer who shall issue such process, or his deputy), and for such affidavit 1s. over and above the stamp duties, shall be paid, and no more, and the sum specified in such affidavit shall be indorsed on the back of such writ or process, for which sum so indorsed, the sheriff &c. shall take bail, and for no more; but if any writ or process shall issue for 10l. or upwards, and no affidavit or indorsement shall be made, as aforesaid, the plaintiff shall not proceed to arrest the body of the defendant, but shall proceed in like manner, as is by this act directed in cases where the cause of action does not amount to 10l. or 40s. as aforesaid.*

38. In action of debt upon a judgment, wherein above 10l. had been recovered, the question was, whether the defendant should be obliged to put in bail? The Court were of opinion, that if there was bail in the original action, then no bail is required in the action upon the judgment, but if no bail in the original action, then bail is to be put in where the debt is above 10l. and an affidavit made thereof according to the late act of parliament. Rep. of Pract. in C. B. 32. Hill. 13 Geo. 1. Jackson v. Duckett. [ 469 ]

39. On a motion for a common appearance, the plaintiff's affidavit set forth, that the defendant entered the plaintiff's hop-ground, and did take and carry away several 1000 of hop poles, to his damage 20l. The Court said the act of parliament did not distinguish actions, but that the plaintiff might hold to bail in trespass, as well as in any other action. Rep. of Pract. in C. B. 106. Trin. 7 Geo. 2. Cook v. Sankey.

Barnes's  
Notes in  
C. B. 24.  
S. C. &  
S. P. and  
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ing down  
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plants; per  
Cur. the

plaintiff is the proper person to swear to his damages by the act of parliament, but no rule was made.

40. In an action of covenant brought by patentee of Drury-Lane play-house against defendant, for not performing dances upon the stage according to articles, whereby plaintiff swore himself damaged 100l. defendant moved in the Treasury for a common appearance,

ance, but did not obtain a rule, the plaintiff having sworn to a certain damage. Barnes's Notes in C. B. 57. Pasch. 8 Geo. 2. Fleetwood v. Poitier.

41. *Action was brought upon a lease dated in 1727, for 2 years rent due since the year 1733, when defendant became a bankrupt. Defendant moved for a common appearance, and produced his certificate allowed, confirmed and inrolled. Upon hearing counsel on both sides, neither the possession nor the legal interest of the estate being in the defendant, a common appearance was ordered to be accepted. Barnes's Notes in C. B. 60. Pasch. 8 Geo. 2. Cantrel v. Graham.*

42. In an action of debt upon bond attested by one witness only, plaintiff had been nonsuited on *non est factum* pleaded, the witness not making sufficient proof of the execution of the bond. Plaintiff brought a new action on the same bond. Defendant moved for a common appearance, and obtained a rule to shew cause, which was discharged on hearing counsel on both sides. Note, *defendant did not in his affidavit deny the execution of the bond.* Barnes's Notes in C. B. 68. Pasch. 10 Geo. 2. Harris v. Roberts.

43. Plaintiff made affidavit that the defendant had *seized and detained his ship to his damage*, and a *capias ad respondendum* was thereon indorsed for bail without a judge's order. Rule for common appearance, and superseas was made absolute; for the damages in this case are uncertain, and the plaintiff was not entitled to bail without a judge's order. In *debt, assumpsit, trover*, bail is of course; but in *trespass and detinue*, at discretion; for *words*, no bail, unless *slander of title*. Barnes's Notes in C. B. 78, 79. Le. Writ v. Tolcher.

Barnes's  
Notes in  
C. B. 71.  
S.C. and the  
rule was  
made abso-  
lute.

44. An action was brought for a *malicious prosecution for forgery*. Upon an affidavit the plaintiff had obtained a judge's order for holding the defendant to bail for 200l. The defendant being arrested and held to bail accordingly, applied to the judge who made the order; the judge not being fully satisfied, directed the defendant to apply to the Court; whereupon he moved to be discharged on entering a common appearance, and by affidavits shewed that the plaintiff was *acquitted on a flaw in the indictment, and not on the merits*. Per Cur. Let the plaintiff shew cause why a common appearance should not be taken. Rep. of Pract. in C. B. 148. Pasch. 11 Geo. 2. Rushell v. Gately.

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45. *Action was brought for 50l. penalty given by act of parliament for defendant's practising as an attorney, not being duly admitted, wherein the defendant was held to bail. Rule to shew cause why common appearance, and superseas was made absolute. This is for a fine or amercement, and is in the nature of a quita tam. Barnes's Notes in C. B. 80. Hill. 12 Geo. 2. Whittingham v. Coghlan.*



# (K) In what Cases. By what Persons Bail must be given.

1. UPON plene administravit pleaded, judgment was against an *executrix*. She brought *error*. It was moved that she should not have a superseas to stay execution without putting in sureties upon the statute of 3 Jac. cap. 8. But resolved that this case is out of the statute; for where the execution shall be of the goods of the testator, and *damages only de bonis propriis*, it was unreasonable that the party should be enforced to find sureties to pay the entire condemnation with his own goods. \*Cro. J. 350. pl. 2. Mich. 12 Jac. B. R. Goldsmith v. Platt.

2. Judgment in debt on a bond was given against an *administrator, who pleaded plene administravit*. It was resolved per tot. Cur. that he shall not be compelled to put in bail upon the 3 Jac. 1. cap. 8. on a writ of *error* by him, and a superseas was awarded for the execution. Cro. C. 59. pl. 3. Hill. 2 Car. in Cam. Scacc. Sir H. Mildmay's Case.

So of an executor, he shall not find bail to answer the principal debt within the stat. 3 Jac. but

by 13 Car. 2. cap. 2. he shall find bail to answer double costs, if found against him; said per Twisden J. to have been so adjudged. Sid. 183. — S. P. because they are only named, and it is not their own debt. Litt. Rep. 3. Hill. 2 Car. C. B. cited by Hendon as adjudged in B. R. Knight v. Weather.

3. Scire facias against an administrator upon *devastavit* alleged, and judgment *de bonis propriis*, whereupon he brought *error*. Per tot. Cur. he shall find bail, because being charged here *de bonis propriis*, it is not like the case where an administrator is charged *de bonis testatoris*; but here it is as if he were charged in proprio jure, and is not like Mildmay's Case, nor Goldsmith's and Platt's Case. Lev. 245. Trin. 20 Car. 2. B. R. Fitzwilliams v. Moor.

S. P. per Cur. obiter. Lev. 39. Trin. 13 Car. 2. B. R. Anon. — The Court would not agree that an executor should be held to bail

upon a surmise of a *devastavit*. Vent. 321. Mich. 29 Car. 2. B. R. in Case of Ent v. Withers. — But ibid. 325. Trin. 33 Car. 2. B. R. Anon. in debet and detinet the defendant was held to special bail on such surmise, and so ruled upon motion.

In debt against an executor on a judgment suggesting a *devastavit*, he shall give bail; for there the action is in the debet and detinet. 1 Salk. 98. pl. 4. Mich. 8 W. 3. B. R. Page v. Price.

4. If executor finds bail in an inferior court, and afterwards the cause is removed by *habeas corpus*, he shall find bail in the superior court. Lev. 245. Trin. 20 Car. 2. by Twisden J.

But S. P. resolved contra; for tho' it be generally used

that when a cause is removed by hab. corp. to find bail in all cases where bail was found in the inferior court, yet this shall not extend to the case of an executor, where the cause does not require special bail by the course of this Court, unless in case of a *devastavit*. Lev. 268. Trin. 21 Car. 2. B. R. Castle v. Willer. — Sid. 418. pl. 2. S. C. ruled that common bail should be accepted; by all the Court, contra Twisden and Lacy, secondary. — 2 Keb. 512. pl. 4. S. C. accordingly per Cur.

An executor being sued in an inferior court, put in special bail. The cause was removed into C. B. by *hab. corp.* The Court held he shall put in bail to appear to a new original within 2 terms, but

but not after, nor to pay the condemnation money. 1 Salk. 98. pl. 4. Mich. 8 W. 3. B. R. Page v. Price. — And ibid. says that Trin. 11 W. 3. in B. R. it was held by Holt Ch. J. that in *all causes removed by bab. corp.* the defendant shall find special bail, except in the case of an executor.

Executor, administrator, or heir shall not find bail; for they ought not to have been held to bail below, the debt not being their own. G. Hist. of C. B. 31.

[ 471 ] 5. *A feme covert sealed a bond.* Afterwards she was arrested and carried to prison; but upon affidavit made that she was covert, and entering her appearance, the Court discharged her without bail. Freem. Rep. 210. Trin. 1676. Lady Thornborough's Case.

2 Jo 82. 6. *Debt in London against the defendant as heir.* The cause being removed into B. R. the question was, whether he should put in bail here, as he must have done in London, where they compel heirs and executors to find bail; but special bail was denied to be found in this case. 2 Lev. 204. Mich. 29 Car. 2. B. R. Lawrence v. Blith. the Court ordered only common bail. — 3 Keb. 823. pl. 3. S. C. ordered accordingly, and the special bail discharged.

An heir, sued as such, shall no more be held to special bail than an executor; per Cur. 12 Mod. 522. Pasch. 13 W. 3. Anon.

7. An executor or administrator shall not be held to special bail, because *the demand is not on the person, but in rem*, viz. the assets of the deceased, unless there be a devastavit suggested. G. Hist. of C. B. 30, 31.

Cumb. 206. 8. In debt on a judgment against an executor, the executor shall Pasch. 5 W. & M. in B. R. Du-bray's Case, S. C. accordingly. — Litt. Rep. 3. 264. Hill. 4 W. & M. B. R. Dupratt v. Testard. S. P. cited to have been adjudged accordingly in B. R. in Case of Knight v. Weather.

9. Where an executor is sued in the detinet, as he must upon the contracts of his testator, he shall not put in special bail; but he must, if he is sued on his own bond or contract. 3 Salk. 57. pl. 14. Page v. Price.

10. A motion by an out-pensioner of Chelsea-College for a common appearance, suggesting that he is a soldier, and within the act 5 Geo. 2. cap. for preventing mutiny and desertion, was denied; and the Court held the defendant no soldier within the meaning of that statute. Rep. of Pract. in C. B. 77, 78. Mich. 6 Geo. 2. Bowler v. Owens.

11. *Debt upon a judgment was brought against a soldier.* The original action, in which the judgment had been recovered, was for a debt under 10l. The defendant being held to bail, it was moved to set it aside; but the Court said the act of parliament for preventing mutiny &c. intended the debt that was due at the time of holding to bail, and this being an action of debt on a judgment for upwards of 10l. though the original cause of action

did not amount to so much, is not within the intent of the act, and so denied the motion. Rep. of Pract. in C. B. 89. Pasch. 6 Geo. 2. Nichols & al. v. Wilder.

(L) Taken. By whom.

1. 3 H. 7. cap. 3. *TWO justices (1 quor.) have power to let to bail persons bailable by law, until the next quarter-sessions or gaol delivery, and shall there certify the same on pain of 10l. and the sheriff and all others, having the custody of gaols, shall certify the names of all prisoners in their custody to the justices of gaol delivery at their general gaol delivery, on pain to forfeit 5l.* One justice may bail a man for a misdemeanor to appear at the quarter sessions; the 3 H. 7. cap. 3. extends

only to cases of felony where two justices are required where bail is taken; per Cur. MS. Cases 3 Ann. Anon.

2. By 1 & 2 P. & M. cap. 13. *Bail for felony, or suspicion thereof, must be taken in open sessions, or by 2 justices, whereof one to be of the quorum, being both present at the time of such bailing; provided that justices of peace, and coroners, within the city of London and county of Middlesex, and in other cities, boroughs, and towns corporate within this realm and Wales, shall within their several jurisdictions have authority to let to bail felons and prisoners, in such manner and form as they have been heretofore accustomed, this act or any thing therein contained to the contrary notwithstanding.* [ 472 ]

3. It seems that no justice of peace could have bailed any one for felony before the statute of 1 R. 3. cap. 3. which was made void by 3 H. 7. cap. 3. For before this he ought to have been bailed by the sheriff, or other keeper of the prison where he was in ward, or by the constable, and by no other officer, unless justices of B. R. justices in Eyre, or justices of gaol delivery. Poph. 96. pl. 1. Trin. 37 Eliz. Anon.

4. An action was brought in the Court of Nottingham, and a *capias* was awarded to the serjeant and officer of the said Court, who arrested, and committed him to Nottingham prison, and the prisoner offered the mayor of Nottingham, keeper of the said gaol, sureties &c. to appear at the next Court to answer the plaintiff in the said action. It was objected, that the sureties should have been offered to the serjeant; sed non allocatur; for the serjeant is but an inferior officer, and though the mayor is judge of the Court in some respects, yet he may be an officer for keeping the gaol, and there he is not the only judge, but the sheriffs also, and the prisoner being in prison under him, it is proper to offer sureties to him. And when the party is brought to the gaol he is under the mayor's custody, and not of the serjeant's. Cro. E. 76, 77. pl. 36. Mich. 39 & 40 Eliz. B. R. Gabriel v. Clerke.

Upon plaint before the sheriffs of London, and a precept to the serjeants to arrest one, the sureties shall be found and offered to the sheriffs, and this is the common course; per Cur. Ibid.—S. P. in an action brought in Lynn, the

*bail was found before the serjeant, and though it was alleged to be so done secundum consuetudinem ville, yet it was held per tot. Cur. not to be good; for the bail being matter of record cannot be*  
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found before any but the judge of the Court; but the bail for appearance only may be taken by the serjeant. Cro. J. 94. pl. 22. Mich. 3 Jac. B. R. Loffe v. Keibridge.

Lat. 113.  
Pasch. 2  
Car. B. R.  
said to be the  
course of  
the Court.

5. A rule was made and agreed per tot. Cur. to be entered in Court, that for the future, no bail should be taken upon any *audita querela* to be allowed, but only in open Court, and not otherwise, or in any other manner. Bullst. 140. Trin. 9 Jac. in Case of Torrey v. Adey.

6. The *King's Bench* may bail if they please in all cases; but C. B. must remand, if the cause of imprisonment returned be just; per Vaughan Ch. J. Vaugh. 157.

Bail in error cannot be put in before a commissioner in the country. Barnes's Notes in C. B. 76. Mich. 12 Geo. 2. in Case of Lushington and Doe on the demise of Godfrey.

7. 4 W. & M. cap. 4. s. 1. The judges of B. R. or C. B. or any two of them respectively, whereof the Ch. J. to be one, and the barons of the coif of the Exchequer, or any two of them, whereof the Ch. Baron to be one, may by commissions under the seals of the respective Courts, empower persons, other than attornies and solicitors, in all the counties of England and Wales, and town of Berwick, to take recognizances of bails in actions depending in the said Courts, in manner as the justices and barons have used to take the same, which recognizances shall be transmitted to some of the justices and barons, who upon affidavits of the due taking, shall receive the same upon payment of the usual fees, which recognizance shall be of like effect, as if it were taken *de bene esse* before any of the said justices or barons, for taking of which recognizances the persons empowered shall receive 2s.

8. S. 3. Any judge of assize may take such recognizances, which shall be received without oath, upon payment of the usual fees.

## [ 473 ] (M) In Inferior Courts, and upon removing Causes thence.

1. IF a man arrested in franchise sues writ of privilege, and removes the body and the cause, and after does not come to prove his cause of privilege, the plaintiff in the franchise may have procedendo, and therefore it seems that there the first sureties remain; contra if he had been dismissed by allowance of the privilege, for then his sureties are discharged; but it seems, that when they remove the body and the cause, they do not remove any sureties, but then there is not any record against them, and then it seems that the privilege being allowed the sureties are discharged; contra where the privilege is not allowed; for then the prisoner and the cause was always remaining with those of the franchise. Br. Procedendo, pl. 13. cites 31 H. 8.

2. Where a cause is removed by habeas corpus, it is the course of C. B. to take recognizance of bail before an action brought; and the Court said, they ought to take notice of the course of C. B. Cro. J. 98. pl. 28. Mich. 3 Jac. B. R. in Case of Hargrave v. Rogers.

3. Bail was given in an inferior court, and upon an habeas corpus brought, Popham Ch. J. took bail. Afterwards a *procedendo* was awarded, and judgment against the principal in the inferior court, which was affirmed on a writ of error, and upon a sci. fa. against the bail below, it was adjudged, that they were discharged, although the bail taken by the Ch. J. was not filed, for that could not be till the term. But it was agreed by all, that if the *procedendo* had been delivered to the sheriff before the taking of the bail by Popham it would have been a superseas to the first writ, and the bail in the inferior court must have stood. Yelv. 120. Hill. 5 Jac. B. R. Fernely v. Fawfet.

Cro. J. 203. pl. 5. Farnely v. Bassett, S. C. resolved and adjudged accordingly.

4. Sci. fa. against the defendant, being bail in an inferior court, who pleaded, that after the first action brought, and bail put in, the cause was removed by hab. corp. into B. R. and bail put in there and accepted, and afterwards the cause was remanded by *procedendo*, and then judgment given against the principal. All the Court held the bail in this case charged, for when the record is remanded by *procedendo*, it is as if it never had been removed, but if it be removed, and bail filed in this Court, and afterwards in another term it is remanded, there it is otherwise, for there the Court is possessed of the cause. Cro. J. 363. pl. 25. Mich. 12 Jac. B. R. Beston v. Buller.

Mo. 836. pl. 1128. Jeffson v. Bunn. S. C. adjudged accordingly; for where it is granted in the same term, there is not any record made of the removal of the first record.

Roll Rep. 64. pl. 10. Cheston v. Bunn, S. C. adjudged accordingly, and execution awarded. — 2 Bullst. 286. Geston v. Buller, S. C. adjudged accordingly.

5. In all cases but that of *devastavit*, where bail is found below in an inferior court, and the cause is removed by hab. corpus, special bail shall be found here, though the cause of action be of a less sum than special bail by the course of the Court ought to be found for; per Cur. Lev. 268. Trin. 21 Car. 2. B. R. in Case of Castle v. Willer.

6. If an *habeas corpus* be returned into any of the Courts above, though the sum be under 10l. they will hold him to bail, that so the plaintiff may not be in a worse condition than he was below, where the defendant was held to bail. G. Hist. of C. B. 31.

7. Debt for 99s. upon a plaint levied in an inferior court, and bail put in; afterwards the cause was removed by habeas corpus into B. R. and there the plaintiff declared as in debt upon a bond for 6l. The question was, whether the bail put in here upon a habeas corpus should be liable? and adjudged that they should not, for it was another cause of action than that to which they were bail. 3 Salk. 55. pl. 1. Hill. 5 W. 3. B. R. Wyatt v. Evans.

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8. If a man is arrested in an inferior jurisdiction, bail out of the inferior jurisdiction will not do, because there process cannot reach such bail; per Holt Ch. J. 12 Mod. 643. Hill. 13 W. 3. in Case of Cross v. Smith.

The reason why the defendants in all cases are obliged to

put in bail is, that their jurisdictions being confined, they cannot follow the debtor out of their jurisdiction; therefore they have always (in the least pledges) put in bail that live within their own precincts, and where it is otherwise it would be improper to give caution, and therefore it becomes here necessary that bail should be given in all cases. G. Hist. of C. B. 31.

1 Salk. 101. pl. 15. S. C. but because it appeared that the defendant had the ship and cargo in his own custody, which was an intermeddling further than the duty of his office warranted, he was held

9. The defendant condemned a ship for want of being registered in England, and plaintiff brought trover and conversion in London, which was removed by habeas corpus. Holt Ch. J. said, that though it was upon a habeas corpus, they might inquire into the cause of action, and if they saw occasion, order special bail; for otherwise the inferior court might be made use of to oppress people, by laying great actions upon them there, and here if the defendant has acted as judge, and the matter was within his cognizance, his sentence, whether right or wrong, binds till it be reversed; and if it were in the Admiralty of France it would be so, and the only remedy in such case is to appeal. 7 Mod. 9. Pasch. 1 Ann. B. R. Lumly v. Quarry.

to bail, which otherwise he would not have been. — 2 Ld. Raym. Rep. 767. S. C. and by Holt Ch. J. the practice is, that if the plaintiff does not shew his cause of action upon summons, the defendant shall be discharged upon common bail, notwithstanding that the cause is removed from an inferior court. Now here the defendant having acted as judge, is not liable to an action; but bail was ordered to be put in for 500l. because if the defendant acted as a judge, he will be out of danger of any action; but if he did not act as a judge, then it is very reasonable that special bail should be put in.

## (N) As to putting in Bail; and when. And the Manner and Entry thereof.

1. IN case of felony by the ancient law, the bail might keep the felon in prison until the day of his appearance; at this day the bail is bound in case of felony to the King in a certain sum of money, and the principal in another sum *sistere se judicio*; by the justices of both benches. Jenk. 129. pl. 63. cites 8 E. 4. 5.

2. The bail upon a writ of attainst is to prosecute with effect, and to pay the condemnation, and to deliver up the plaintiff's body, if it be found against him. Jenk. 129. pl. 63.

3. In case of error the recognizance is that the plaintiff shall sue cum effectu, and pay the condemnation or render his body to prison. Jenk. 129. pl. 63.

Where there is an attainst upon an information for the King and the party, the recognizance in this case of attainst, shall be in the copulative, to the King pro suo in-

4. Attainst was brought in C. B. on a verdict in B. R. in an information of usury; the plaintiff was in execution for the penalty, *tam pro rege quam pro parte*; resolved that the recognizance of the bail shall be to both the queen and the party, and (as well to discourage suitors in the attainst, who are in execution by trial, by verdict, as also by reason the warrant to the justices was in the copulative that he should find mainprize to render his body and satisfy the sum) that it should be in the copulative, both to pay the condemnation, and to render the body to prison. D. 364. b. 395. a. pl. 30, 31. Mich. 21 & 22 Eliz. Anon.

teresse, and to the party pro suo interesse. Jenk. 129. pl. 63.

5. An infant being in execution upon a condemnation in debt, brought a writ of error; his father and his brother were his bail; it was the opinion of the justices, that they two only should enter into the recognizance, that the infant shall appear, and that if the judgment be affirmed, that they shall pay the money, and not that they shall render the body of the infant again to prison; for that when once he is discharged of the execution, he shall never be in execution again. 3 Le. 113. pl. 162. Pasch. 26 Eliz. B. R. Toker v. Norton.

6. One in execution for debt on a judgment in C. B. brought a writ of error in B. R. and prayed to be bailed; all the Court held that if there be any error apparent he shall be bailed, and the sureties shall be bound to answer the debt if the judgment be affirmed, and not to deliver the body in execution, and the clerks said that all the precedents in the Court are so; and Gawdy said that in the 4 & 5 Eliz. all the precedents were altered, for before that time it was a doubt, but then the law was resolved as above. D. 139. b. Marg. pl. 29. cites Pasch. 35 Eliz. B. R. Onknall v. Truffel.

7. But where one is in execution on a statute merchant, and he sues an audita querela, and thereupon is bailed, his sureties shall be bound to render his body to be imprisoned, as he was before; per Gawdy, and this was agreed per tot. Cur. D. 139. b. pl. 29. Marg. cites Pasch. 35 Eliz. B. R. Onknall v. Truffel.

In an audita querela, by the statute of the 11 H. 6. cap. 10. a recognizance must be acknowledged by the condemn-

ledged to the King, in a certain sum of money to sue with effect, and to the party to pay nation if it be found against the plaintiff, or to deliver up his body. Jenk. 129. pl. 63.

8. Note, that in case of bailing of a prisoner, the constant rule observable in B. R. is this, that where the return of the sheriff is to be at a day to come, as Octabis Michael. proxime sequent. and the prisoner is bailed (being bailable) before the day of the return, the bail then to be taken ought to be in a sum of money, and not to be body for body. The reason of this is, for that before the return, he is not present in court; but if the prisoner be bailed after the day of the return, and when he is present in Court, the bail is then to be de die in diem, and in this case the bail is to be taken body for body, because the prisoner is present in court; and this was agreed by the Court to be the constant rule and course of the Court, and Man secondary did affirm the constant rule of the Court to be so. Bult. 45. Mich. 8 Jac. in Case of Smith v. Jones.

9. Error of judgment in debt, because the entry of the bail was sub pœna executionis in adjudicatione executionis, and so entered for the execution only, and not for the judgment, whereas it ought to have been sub pœna condemnationis; the Court held it to be well enough, for the bail being once taken, stands as well for the judgment as the execution; and ordered it should be amended, and made sub pœna executionis judicii. Cro. J. 272. pl. 5. Hill. 8 Jac. B. R. Hampton v. Courtney.

Bult. 107. S. C. ruled accordingly.

10. A latitat was against A. and B. for a conspiracy; both were taken

which the defendant *pleaded compersuit ad diem*, and in order to maintain that plea, the Court was now moved for leave to strike out the exception on the bail piece, that it might be filed, insisting that the proceeding generally was a waiver of the exception; and the Court ordered them to shew cause. Rep. of Pract. in C. B. 155, 156. Hill. 12 Geo. 2. Walth v. Haddock.

16. It being doubtful whether Sunday should be reckoned as one day in notice to justify bail, it was determined per Cur. that for the future Sunday shall not be counted one (it not being a proper day to inquire after bail upon) but *two days notice must be given, of which Sunday shall not be one*; upon motion for defendant to justify bail, notice was served Saturday June 23, to justify bail Monday 25; the notice being insufficient, the bail were not suffered to justify. Barnes's Notes in C. B. 220. Trin. 13 Geo. 2. Gregory v. Reeves.

## (Q) Given by a wrong Name, and the Offence of Personating another.

The defendant was arrested by the name of Gerrard, and put in bail by the name of Gerrat, and all the proceedings against him were by the name of Gerrat. It was moved in arrest of judgment, that here was no bail entered, for they were bail for Gerrat, when the defendant's name was Gerrard; but adjudged good, for otherwise every defendant may give a wrong name to his attorney, by which he would be bailed, and then move it in arrest of judgment. Goldsb. 139. pl. 8. Hill. 45 Eliz. Gerrard's Case.

1. IN ejectment bail was put in for the defendant by the name of Parkes, but the declaration and all the proceedings were by the name of Parkhurst. After a verdict for the plaintiff the judgment was arrested, because it did not appear that the defendant was in custodia mareschalli; for Parkhurst and Parkes cannot be intended the same person. Cro. E. 223. Pasch. 33 Eliz. B. R. Gore v. Parkhurst.

S. C. cited Ld. Raym. Rep. 445. Pasch. 11 W. 3. in Case of Dodd v. Beckman and Carman, where the point was much the same,

2. The plaintiff having recovered against the principal, and sued 2 sci. fac. against the bail, and having judgment against him, whereupon he was taken. The bail complained to the Court that he was not the man, but personated by another, and which he proved by divers witnesses; and it was confessed by the defendant and those that procured the bail. It was awarded that a *vacat* should be made of that bail quoad him, and of the judgment on the *sci. facias*. Cro. J. 256. pl. 14. Mich. 8 Jac. B. R. Cotton's Case.

the bail being sworn to be at Canterbury at the time the bail was entered into at the judge's chambers; but it appearing further, that the same bail was bail for the same principal in two actions in C. B. before another judge, within 4 or 5 days after he is supposed to have been entered as bail at the other judge's chambers in the case here, and that the principal was bound in a bond with the bail for the bail's debt about the same time, or very little after, and that the principal was insolvent, and gone beyond sea, the Court refused to discharge the proceedings against the bail.

See tit. Personating,

3. 21 Jac. 1. cap. 26. Enacts, that it is felony without benefit of



*of clergy to acknowledge, or procure to be acknowledged, any bail in the name of other person not privy or consenting thereunto, provided that it shall not corrupt the blood, or take away dower.*

pl. 5. and the notes there. — The defendant was

*indicted upon the statute for acknowledging bail in the name of another, the jury found a special verdict, that this bail was taken before a judge de bene esse, but never filed, and whether this was felony or not, was the question? It was insisted that it was, because the filing, or not filing it, was not material; for if it should, then it would be in the power of the attorney to make it felony or not; the man had done all in his power to do for perfecting the bail, therefore he is within the intent of the statute, which was made to punish the abuse of counterfeit bail; but it was answered, and so held that is not bail till filed, and made a record of the Court. 2 Sid. 90. Trin. 1658. B. R. Timberley's Case.*

4. R. offered himself to be bail in an action before justice Whitlock, affirming upon his oath he was a subsidy-man, and assised 4l. for goods in the subsidy-book; but afterwards, upon further examination, he confessed he was not a subsidy-man, and also confessed he had been bail in other actions, and had sworn he was a subsidy-man, whereas now he confessed he was not. He was by the judgment of the Court committed to prison, and to stand upon the pillory, with a paper mentioning his cause, viz. for false bail. Cro. C. 146. pl. 25. Mich. 4 Car. B. R. Royson's Case.

5. 4 & 5 W. & M. cap. 4. s. 4. Enacts, that any person representing or personating another before commissioners appointed to take bail, shall be adjudged guilty of felony.

## (R) Liable in what Cases, and how far.

1. **T**HE bail, before judgment against the principal, made a lease of his lands for a valuable consideration, and afterwards the plaintiff obtained a judgment against the principal; the question was whether these lands are liable to the judgment; Montague and Crook held that they were liable, for otherwise many bailments and judgments might be defeated; but Haughton being contra, Curia advisare vult. Poph. 132. Mich. 15 Jac. B. R. Baskerville v. Brooks.

Cro. J. 449. pl. 29. Baskerville v. Brocket, S. C. and Broome the secondary said, that the precedents, upon the entry of a judgment Ibid. 452.

against the bail, are, de tempore recognitionis secundum formam recognitionis.

2. Per Keiling Ch. J. the course of the Court is, that if a man be brought in upon a latitat for 20 or 30l. we take the bail for no more, but yet he stands bail for all actions at the same parties suit; otherwise if a stranger brings an action against him; Twisden said they cannot declare till he hath put in bail, and when we take bail, it is but for the sum in the latitat, perhaps 30 or 40l. but when he is once in, he may be declared against for 200l. Mod. 16. pl. 45. Mich. 21 Car. 2. B. R.

Anciently in special bail in civil actions, where the bail is to stand in the place of the principal, bail to one action was to stand bail to all actions

that he should be charged with, when in court. This was hard in case of special bail, and is therefore now altered, though altered only by rule of Court; and that as to common bail, the law is still the same. 10 Mod. 153. Pasch. 12 Ann. B. R. in Case of the Queen v. Ridpath.

## 3. Bail

3. *Bail* ought to answer no more than what is mentioned in the *ac-etiam* bill, per Curiam. 2 Chan. Rep. 55. 22 Car. 2. Boulter v. Chester.

4. Though *part of the debt be levied on the principal*, yet the bail were liable for the residue; *sed dictum fuit*. Freem. Rep. 344. pl. 425. Trin. 1673. Heate v. Manuscriptors of Hall.

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6 Mod. 90.  
S. C. but  
S. P. does  
not appear.  
Ibid. 266.  
S. C. and  
S. P. agreed  
accordingly.

5. The plaintiff brought an action of *tr. pass &c. by bill of Middlesex*, with an *ac-etiam* for 40*l.* and recovered 100*l.* It was held by the Court that the bail should not be liable for more than the *ac-etiam*; for that is the *measure of the undertaking*; and Holt. Ch. J. held that the bail are not liable at all, because the recognizance is to answer the condemnation-money, and since that cannot be, *they are bound to nothing*. 1 Salk. 102. Mich. 3 Ann. B. R. Genbaldo v. Cognoni.

6. The plaintiff obtained judgment against the principal for 231*l.* which judgment was contested by him so far as he could, even to an affirmance in the House of Lords, and afterwards the plaintiff obtained a judgment *upon a sci. fa. against the bail*; and the question now was, *whether they should pay interest from the time the judgment was had against the principal?* They offered to pay the principal sum and costs; and it was insisted for the plaintiff, that he ought to have the whole, and the Court inclined to that opinion. 8 Mod. 326. Mich. 11 Geo. Anon.

## (S) Of Assigning of the Bail Bond.

Win. 62.  
Hill. 20 Jac.  
C. B. in the  
Case of Sparrow v. Sowergate has a note that before any capias, it is clear he may have an action of debt.

1. **A**N action of debt was brought against the bail upon their recognizance, which was, that *if the defendant should be convicted, then as well the debt as damages and costs*, which should be adjudged for the plaintiff, *should be levied on their lands and chattles*. The principal upon a *ca. sa.* against him in *Easter term*, 7 Jac. did not render his body, but afterwards in *Mich. term* did render his body, and the Court accepted it, and held the bail should be discharged, and judgment for the defendant. Brownl. 65. Trin. 8 Jac. Booth v. Davenant.

—After judgment against the principal, debt was brought against the bail, upon their recognizance, and it was moved for an imparlance, because debt lies in such case, for by this means the bail will be ousted of his plea of no capias tied against the principal, and also be abridged of his time to bring in the principal, which he hath till the second time facies returned, and for this reason the Court granted an imparlance, that such action lies not; quod nota. Raym. 14. Pasch. 13 Car. 2. B. R. Godlington v. Lee.

2. Though the bail taken by the sheriff be ever so good, yet the plaintiff may refuse an assignment of it, and proceed against the sheriff by amercements, therefore it behoves him to take good bail. It is true, the sheriff shall not be brought in contempt for not bringing in the body, but the only way is to amerce him, and sheriff may proceed on the bail bond; and the plaintiff by 23 H. 6.

*H. 6. cap. 10. has election of bail or amercement; per Cur. 12 Mod. 447. Pafch. 13 W. 3. Pickering's Cafe.*

3. The way upon taking assignment of bail bond is to *indorse a promise* upon it, to *save the sheriff harmless against amercements*, and yet the bond continues still in the sheriff's custody. 12 Mod. 516. Anon.

4. If sheriff take *insufficient bail*, and plaintiff's attorney accepts of an assignment of it, he thereby discharges the sheriff from amercements; per Holt. Ch. J. 12 Mod. 527. Trin. 13 W. 3. Anon.

5. The sheriff upon assignment does *not part with* the possession of the bond, because if the plaintiff be nonsuited the sheriff must be indemnified; but he *must produce it at the trial*; per Holt Ch. J. 12 Mod. 527.

6. The defendant being sheriff, and having taken up a man upon an attachment, took a bail bond from a sufficient bail for his appearance. It was moved by Raymond, that the prosecutor should be *compelled to take an assignment* of the bail bond, and this he said was frequently granted in the Common Pleas, where obligee was a sufficient person; but the Court denied the motion. 12 Mod. 579. Mich. 13 W. 3. the King v. Daws.

2 Salk. 608.  
pl. 1. S. C.  
accordingly  
—Ld.  
Raym. Rep.  
[ 482 ]  
722. S. C.  
accordingly;  
and that the  
plaintiff may

either accept an assignment, or proceed against the sheriff by amercements, and the sheriff may reimburse himself by suing the bail bond, but if the bond is not sufficient he is without remedy.

7. 4 & 5 Ann. cap. 16. Enacts, that where the sheriff or other officer takes a bail bond upon an arrest made upon any person upon process issuing out of any of the courts of record at Westminster, the sheriff or other officer shall, at the request and costs of the plaintiff in such action, or of his lawful attorney, assign to the plaintiff the bail bond, or other security taken from such bail, by endorsing thereof, and attesting of it under his hand and seal, in the presence of two or more credible witnesses, which may be done without any stamp, provided the assignment so indorsed be duly stamped before an action brought thereupon. And if the said bail bond or assignment, or other security taken for bail be forfeited, the plaintiff, after such assignment made, may bring an action in his own name; and the Court where the action is brought, may, by rule or rules of the same Court, give such relief to the plaintiff and defendant in the original action, and to the bail upon the said bond, or other security, as is agreeable to justice and reason; and such rule and rules of Court shall have the nature and effect of a *disseance* to such bail bond, or other security for bail.

8. Debt upon a bail bond as assignee of the sheriff of Suffolk, according to the late act of Parliament, and declared generally without shewing matter specially, that it was a sheriff's bond, which by the late act is assignable; to which there was a demurrer; per Cur. it should have been shewn that it was a bond assignable; and when Mr. Salkeld found the opinion of the Court against him, he prayed to discontinue, which was granted on payment of costs.

costs. 11 Mod. 170. pl. 7. Pasch. 7 Ann. B. R. *Bushell v. Haynes*.

9. Holt Ch. J. said, that upon an action by an assignee of a sheriff's bond, it is enough *to set forth*, that the bond was *pro comparentia* of the defendant, and there is no need of setting out the matter at large. 11 Mod. 237. *Collins v. De-la-Fountain*.

10. Holt Ch. J. made it a rule of Court, and ordered it to be screened up in the office, that *no bail bond shall be assigned in town till 4 days after the return of the writ, and not till 6 days after the return in a country cause*. 11 Mod. 253. pl. 4. Mich. 8 Ann. B. R.

11. In debt by assignee of a bail bond, it was objected to the declaration on a demurrer, that the breach of the condition was *set forth to be, his not appearing secundum exigentiam brevis, nor set forth on what day the writ was returnable*, and then non constat, whether he did appear or not, *secundum exigentiam brevis*, and so whether the bond was forfeited or not; and Parker Ch. J. held the not setting forth the return of the writ to be a fatal objection; sed adjournatur. 10 Mod. 190, 191. Mich. 12 Ann. B. R. *Sestern v. Clobber*.

12. *H. a high sheriff did, by a legal instrument, make L. his under-sheriff in trust for A. who had been under-sheriff the year before; neither L. nor A. took the oaths required by 27 Eliz. cap.*

12. *After H.'s year was expired, and before a new sheriff appointed, A. makes an assignment of a bail bond; and the question was, whether A. was such a person, as that his assignment of the bail bond was a good assignment within the statute for the amendment of the law. (N. B. A. always acted as under-sheriff, and L. not at all.) See the point debated; sed adjournatur.* 10 Mod. 288. &c. Hill. 1 Geo. 1. B. R. *Kitson v. Fagg*.

[ 483 ] 13. An action of debt was brought upon an assignment of a bail bond taken by the sheriff, who had arrested the defendant upon a *capias* &c. and upon a demurrer to the declaration it was objected, that the plaintiff had *not set forth the capias, or the teste, or return of any capias*, as he ought to have done, and the Court of C. B. being of that opinion, a writ of error was brought in B. R. but the judgment of C. B. was affirmed; for it is the *capias* which gives life to the bond. 8 Mod. 78. Trin. 8 Geo. *Tucker v. Goldburne*.

14. *Assignees of a bail bond by the sheriff, brought debt and had judgment by nil dicit, whereupon error was brought, because it was not shewn that the sheriff assigned the bond to them by indorsing the same and attesting it under his hand and seal in the presence of 2 or more credible witnesses, as the statute 4 Ann. cap. 16. par. 20. directs, but only alleges that the sheriff at the costs of the plaintiff in the suit, according to the form of the statute in that case lately made and provided, did assign to the plaintiffs the said bond; but the Court unanimously over-ruled the exception, "all defects" (which would have been aided by verdict) being aided after*

"judgment by nihil dicit, by the same act of 4 Ann." and it being expressly alleged that the bond was assigned *secundum formam statuti*, and judgment was affirmed. 2 Ld. Raym. Rep. 1564. Mich. 3 Geo. 2. Mifflin, alias Peters & al. v. Sir William Morgan.

## (T) Of suing the Bail.

1. IF a man be by mainprise, and does not keep his day, *capias* shall issue against him and his mainpernors; quod nota. Br. Process, pl. 28. cites 2 H. 4. 14.

2. Recognizance of bail by F. & B. was joint and several, and judgment was held against the principal; two *sci. fac.* issued against both the bail, and upon default judgment was quod querens habeat executionem against them *secundum formam recognitionis prædictæ*. The plaintiff brought a *ca. sa.* against F. only, and levied the debt upon him only by imprisoning him till he paid it; it was moved for a superedeas and restitution, because the judgment in the *sci. fac.* being joint, the execution by the *capias* ought to be so also; and though the recognizance was joint and several, so that he might have brought *sci. fac.* against one only, yet having elected to take it against both, the *ca. sa.* should be so too; but per Cur. this is not judgment to recover, but that habeat executionem, and is to be according to the recognizance joint or several. Where the judgment is joint, the execution should be so too; but the recognizance out of which the *sci. fa.* issues as out of the judgment being joint and several, though the *sci. fa.* was joint, yet the execution may be several as the record is, out of which it issues, and so the execution was ruled good. Lev. 225. Mich. 19 Car. 2. B. R. Gee v. Fane.

Sid. 339, 340. pl. 3. S. C. and the Court held the execution well awarded; for a recognizance is a judgment upon which, after the year, there was no other remedy but an action of debt, till the statute Westm. 2. cap. 45. which gives *sci. fa.* in personal actions; and this statute

wills that if execution is not done within the year, then it shall be commanded, quod exequi faciat; but it is not said that after the *sci. fa.* he shall have judgment to recover; and therefore the recognizance of the bail, which is joint and several, continues as it was, and is not altered by the *sci. fa.* and if debt be brought it ought to be upon the first judgment; and it is not like to an obligation; for the lieu [lien] of the obligation is altered and changed by the judgment upon it.—2 Keb. 269. pl. 28. S. C. Twisden doubted, but Windham agreed; but all agreed that on joint execution against both, either may be taken; but the [writ of] execution must be against both, viz. *sci. fa. eos &c. et adjornatur*.—Ibid. 274. pl. 33. S. C. The Court denied a superedeas, and held that a *sci. fa.* never goes out against one.

2. If 3 men bring an action, and the defendant puts in bail at the suit of 4, they cannot declare; but if he had put in bail at the suit of one, that one might declare against him; per Twisden J. Mod. [ 484 ] 5. pl. 16. Mich. 21 Car. 2. B. R.

3. An *hab. corp. ad faciend. & recipiend.* was directed to an inferior court. A plaintiff was returned in trespass on the case against the defendant, and thereupon special bail put in for the defendant, *ad sectam querentis in querela*. The plaintiff afterwards declared against the defendant and another jointly, and had judgment against them, and now brought a *scire facias* against the bail. Sed per Cur.

Cur. the bail are not liable to this joint action, and so they were discharged. 2 Jo. 188. Hill. 33 & 34 Car. 2. B. R. Nichols v. Tucker.

Skin. 100. pl. 16. Hill. 35. Car. 2. B. R. Trevisa's Case, S. C. and it was said that it being upon recognizance the sci. fa. might be brought against the survivor, though otherwise of a judgment in debt on an obligation, because there it is made joint. there would

4. *M.* the defendant, and *A.* were bail for *J. S.* in an action brought by *T.* who recovers and brings a *sci. fa. against M. and A. jointly*, and had judgment; *A. dies*, and then *T.* dies. The executor of *T.* brings a *sci. fa. against M. the survivor*, to which he demurred. It was argued that, by the plaintiff's bringing a *sci. fac. against both*, his election to make the recognizance joint or several is determined; and compared it to the case of an obligation, and that being a personal lien it should survive &c. but it was answered, that by the *scire facias* nothing is recovered, it is merely a thing relative, and now this *sci. fac.* was to revive the 1st recognizance, and needs not take notice of the judgment in the *sci. fac.* and that therefore the plaintiff here had the like election as *T.* had. Jones J. asked him, what if execution had been for part? to which it was said, then he must shew it, and pray execution for the residue; adjournatur. Skin. 82. pl. 24. Mich. 34 Car. 2. B. R. Banaton v. Morris.

Quære hereof, the Court taking time to advise; and in this case Jones J. said that there would be a difference between an obligation and a recognizance.

5. In a *cause at law* there was *bail and judgment*. The defendant brought his bill in this Court, and in order to obtain an *injunction* did, by order, enter into a recognizance for hearing the *cause* &c. and thereupon had an *injunction*, which he kept on foot a year; after which he surrenders himself at law, in discharge of his bail. The defendant in this Court then moved for leave to prosecute upon the recognizance. Upon reading an affidavit of notice it was granted, no defence being made on the other side. P. R. C. 300.

6. By the course of the Court the plaintiff, after judgment against the principal, may sue out 2 *sci. fac.* both together against the bail, with *teste backward*, so that there be 15 days between the teste and return of each writ; per Eyre J. Comb. 287. Trin. 6 W. & M. in B. R. Anon.

7. One cannot stay proceedings upon bail-bond till other bail be put in, and justified, if excepted against; per Holt Ch. J. 12 Mod. 614. Hill. 13 W. 3. Anon.

8. In *scire facias* against bail, the 2d must be tested on the return of the first, and both cannot be taken away at a time. There ought to be 15 days inclusive between the teste of the first and return of the second; per Holt. 7 Mod. 40. Trin. 1 Ann. B. R. Anon.

9. The ancient course was, that a bail-bond could not be put in suit till a rule was had to amerce the sheriff for not having the body ready; and now proceedings on the bond-bond were set aside, because there was no *cepi corpus* returned. 6 Mod. 229. Mich. 3 Ann. B. R. Anon.

11. Debt was brought in C. B. and a recognizance taken, and an action of debt was brought on that recognizance in B. R. The Court was moved that there might be no special bail given; for that this was only a device to better the security. Sed per Holt Ch. J. and Powell, upon a recognizance of bail in C. B. *no capias lies*, because it is for a sum certain; but upon the like recognizance in B. R. *a capias lies*, because it is body for body, and there may be a reason to help them to a capias upon the recognizance. 3 Salk. 55. pl. 2. Pasch. 4 Ann. B. R. Anon.

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12. The bail was arrested upon a *clausum fregit*, with an *act-etiam in debito super demand'*. The plaintiff thereupon proceeded to judgment; and now, on motion to set aside these proceedings, the question was whether the plaintiff should not have sued by special writ; and the Court held that an *act-etiam in debito* is an action of debt within the meaning of the rule of Court, but that the defendant, i. e. the bail, must be arrested at least 4 days before the return of the writ or process, so that he may have time to render the principal. Rep. of Pract. in C. B. 18. Mich. 6 Geo. 1. Wright v. Duxon.

13. If the bail are sued upon the recognizance, they must give bail; held by 2 judges, the Court not being full. 8 Mod. 237. Pasch. 10 Geo. 1. Christy v. the Bail of Anstruther.

14. Two persons entered jointly and severally into a recognizance of 4000l. bail for another, and afterwards the plaintiff brought a sci. fa. against both of them jointly, and had judgment for 4000l. against each of them; and now it was objected, that this judgment was erroneous, because a several judgment cannot be given upon a joint sci. fa. no more than upon a bond. It is true a recognizance may be joint and several (as this was), and such a recognizance may warrant a joint and several sci. fa. but yet a several judgment can never be had upon a joint sci. fa. against each of the cognizors, for the plaintiff might have brought a sci. fa. against each of them separately, and not against both jointly. The Court was of opinion, that would be to multiply actions, and that this was the constant form, and so the judgment was affirmed. 8 Mod. 199. Mich. 10 Geo. Cornish v. Clerk & al.

Judgment against the principal, and a sci. fa. was brought against the bail, and upon 2 *nihil returned* there was judgment against the bail, and afterwards action of debt was brought against one of the bail, for all the

money due to the plaintiff; and it was objected, that this action would not lie against one of the bail, because the judgment against them is joint. It was said on the other side, that the action was brought upon the recognizance of bail, which is joint and several, and consequently good, either joint or separate; and so is the Case of Cornish v. Clerk, Mich. 10 Geo. and so was the opinion of the Court in this case. 8 Mod. 295. Trin. 10 Geo. Williams v. Green.

15. The Court held, that in order to charge the bail a *ca. fa.* against the principal must be left with the sheriff 4 days before it is returnable. Rep. of Pract. in C. B. 34. Pasch. 13 Geo. 1. Laycock v. Arthur.

16. A *capias* issued into York, a *testatum capias* into Middlesex, and a sci. fa. against bail in York, and judgment thereon, and *testatum execution* in Middlesex; and now the Court was moved

to set aside the judgment, because the *sci. fa.* against bail ought to be where the bail or recognizance is entered on record; and in this case the *sci. fac.* issued into York, whereas it ought to have issued into Middlesex, the bail being recorded at Westminster; but *Cur. advisare vult.* Rep. of Pract. in C. B. 53. Pasch. 2 Geo. 2. Dalton v. Teafdale.

### (U) Scire Facias against the Bail. Proceedings therein.

[ 486 ] 1. UPON a writ of error brought the bail entered into a recognizance, conditioned, that if the judgment is affirmed to pay the money &c. and a *sci. fa.* being brought on this recognizance, it was objected against the *sci. fa.* that it was *not returnable on any return day, but on a day certain*; and it not being grounded on any bill, or thing in nature of a bill, it ought to be returnable on a return-day; but if the *sci. fa.* had recited the condition of the recognizance, then it had been in nature of a bill, and well, but here it is a writ, and therefore ill; and all the clerks said, that so was the constant usage, and the Court stayed the judgment. Lev. 246. Trin. 20 Car. 2. B. R. Allen v. Cutler.

2. M. the defendant and 2 others, entered into a *recognizance for the good behaviour of M.* Afterwards *M. was indicted, for that he being so bound, did assault J. S. and so had forfeited his recognizance*; but this indictment was quashed, because he ought to have been prosecuted by *scire facias*, and not by indictment. Raym. 196. Mich. 22 Car. 2. B. R. the King v. Moor.

3. A writ of error was brought by the bail to reverse 2 judgments in Ireland, viz. *that against the principal, and that against the bail.* The Court held, 1st, That the writ was abated in the whole. 2dly, That the record of the judgment against the principal was not removed by this writ, and so it was said it had been resolved formerly in one BOOTH'S CASE, which was cited by the Ld. Ch. J. and remembered by Jones attorney general; but the question was, how the defendant in the writ of error should proceed to have the fruit of his judgment against the bail, the record being removed hither, and so they could not grant out execution in Ireland? And it was proposed by Hale Ch. J. to take out *sci. fa.* into Middlesex upon the recognizances which are now here, and upon the return of them to grant execution into Ireland. But afterwards it appearing that those judgments were not made records here, by reason they were not entered upon the Rolls, they said they would find a certificate to the judges in Ireland, that nothing was removed here before them, and thereupon they might grant execution; but upon the judgment against the principal, the party might have execution



Execution there, for that record was never removed. Freem. Rep. 416, 417. pl. 552. Mich. 1675. Eustace v. Kepin.

4. There must be 7 days exclusive betwixt the teste and return of every ca. fa. to warrant a sci. fa. against the bail, and the capias ought to be delivered to the sheriff of the county, or his under sheriff, 4 days exclusive (and none of them must be Sunday), before the return thereof, for the defendant cannot render himself but to the sheriff or under-sheriff, and in the county where he is sheriff or under-sheriff. 6 W. 3. B. R. L. P. R. 249.

sci. fa. must lie a convenient time, for no certain time is limited, and the first sci. fa. may be antedated, even in term time; per Clarke secondary; but per Holt Ch. J. it cannot, where it issues by rule of Court. 2 Salk. 599. pl. 6. Trin. 11 W. 3. B. R. Anon.

5. In C. B. there is but one sci. fa. and upon a nihil returned, execution. But in B. R. there are 2, and 2 nighils returned, but both must not be sued out together; for the first should be duly returned before the 2d sued out, and the 2d should bear teste on the day of the return of the first. 2 Salk. 599. pl. 4. Trin. 8 W. 3. B. R. Anon.

and returnable the 7th of November; the Court held this very well, there being 15 days inclusive. 2 Salk. 599. pl. 7. Mich. 11 W. 3. B. R. Goodwin v. Peck.

6. Where the sci. fa. is against the bail, it should be in ea parte, but where it is against the defendant himself it should be in hac parte. 2 Salk. 599. pl. 5. Mich. 10 W. 3. B. R. Lugg v. Goodwin.

held good. [But it is not distinguished there, whether the sci. fa. was against the principal or the bail.]—Ld. Raym. Rep. 391. S. C. and Holt Ch. J. said, that upon search of precedents where the sci. fa. was sued against the defendant upon a judgment against himself, in hac parte, is \* well enough; but contra if it be sued against the bail; for there it must be, in ea parte. And this distinction he said would reconcile all the precedents.

\* [ 487 ]

7. Judgment in sci. fa. against the bail was reversed upon a writ of error, because there was no warrant of attorney; for such a warrant in the principal action is no warrant to the sci. fa. because these are distinct actions; therefore there ought to be a particular warrant of attorney to this sci. fa. against the bail, and it ought to be entered upon the return of the sci. fa. for then the suit commences. 2 Salk. 603. pl. 13. Pasch. 5 Ann. B. R. Atwood v. Burr.

not appear.—2 Ld. Raym. Rep. 821. S. C. but S. P. does not appear. But ibid. 1200. S. C. & S. P. and Holt Ch. J. said, that the plaintiff might pray a sci. fa. without an attorney, but when he comes to pray judgment upon it, he does it by attorney; and there is no warrant of attorney before, and therefore it is error; and of that opinion were all the Court, and judgment was reversed nisi &c.

8. In C. B. there is but one scire facias against the bail, and upon a nihil returned there is execution; but in B. R. the course is to have 2 scire facias's against the bail, (viz.) a sci. fa. and an alias sci. fa. but both must not be sued out together, as formerly; for

the first shall be duly returned before the alias sci. fa. is sued out, which must bear teste on the day of the return of the first, and there must be 15 days inclusive between the teste of the first and the return of the alias; now the Court was moved to set aside a judgment obtained against the bail upon 2 scire facias's brought against them, because it did not appear that the judgment was had on the return of 2 nibils, and it was referred to the master to examine this matter. 8 Mod. 227. Hill. 10 Geo. Andrews v. Harper.

9. If the first sci. fa. against the bail bears teste the same day on which the ca. fa. is returnable, it is good; for in many cases the law takes notice of the fraction of a day, and here it shall be took that the ca. fa. was returned before the sci. fa. was sued out, which might very well be, though both were on the same day. 2 Ld. Raym. Rep. 1567, 1568. Pasch. 3 Geo. 2. Stewart & al. v. Smith & al.

### (W) Remedy for the Bail; and Stay of Proceedings. In what Cases.

Cro. C. 481. pl. 4. S. C. agreed that the bail cannot assign error in the principal judgment, nor take advantage of any error therein; and that if the writ of error had been brought for error only in the principal judgment it had been clearly ill, but because the writ of error supposes error in the principal judgment, and also in the judgment in the scire facias against the bail, as also in reditione executionis superinde, Jones held that the writ of error will lie for that part, and shall be void for the residue. But Berkly and Croke (Brampton being absent) were of opinion that the writ was ill, and should abate in all, because it is grounded on the first judgment, and also upon the judgment in the sci. fa. and so coupling them together all is void; but if the bail in their writ of error had recited the first judgment (as of necessity they must make mention thereof) and the 2d judgment in the sci. fa. and alleged error in that judgment, and in the execution thereof &c. it had been well enough.

[ 488 ] 2. Judgment on a sci. fa. against the bail, who brought a writ of error as well upon the judgment against the principal, as upon the judgment on the sci. fa. but it was quashed, because they were not parties to the original judgment. 5 Mod. 397. Pasch. 10 W. 3. Atwood v. Duell.

3. It was ruled per Holt Ch. J. that the ancient course was, that a bail bond could not be put in a suit till a rule was had to amerce the sheriff, for not having the body at the return of the writ; and the course now is to stay proceedings on the bail bond, if there is no return of a cepi corpus. 3 Salk. 56. pl. 4.

4. If one who becomes bail has a warrant of attorney to indemnify him, yet he cannot enter it up, and take out execution upon it,

it, till some process is gone out upon the bail bond, whereby he has an injury done him. 11 Mod. 2. pl. 5. Pasch. 1 Ann. B. R.

5. There ought not to be a stay of proceedings on a bail-bond upon *bringing principal, interest, and costs into Court*, after notice of trial, unless it be brought in such time as the plaintiff may not be delayed of his trial; per Cur. 6 Mod. 25. Mich. 2 Ann. B. R. Butler v. Rolfe.

6. If the defendants in the scire facias will *confess judgment, and enter into a rule to pay the debt, or to deliver up the principal within 4 days after the judgment shall be affirmed*, in such case the proceedings on the sci. fa. should be stayed. 8 Mod. 130. cites it as resolved, Eaſter 8 Geo. Myer v. Arthur.

3 Salk. 56.  
pl. 3. S. C.  
accordingly.

S. C. Ibid.  
129 Pasch.  
9 Geo. Wal-  
ler's Case,  
which ſays,  
the Court  
was moved  
to ſtay pro-

ceedings on a sci. fa. brought againſt the bail, there being a *writ of error depending in the Exchequer Chamber*; and the Ch. J. was of opinion, that the like rule ſhould be made in this caſe as in the caſe of Myer v. Arthur. It is true, the plaintiff in the sci. fa. is to have *judgment immediately againſt the bail, but he is tied up from ſuing out execution until 4 days after the judgment ſhall be affirmed*, and then on non-payment of the debt, or not rendering the principal, he is at liberty to take out execution, and by this means expences would be ſaved on both ſides.

7. A motion to ſtay proceedings in an action of *debt on a recognizance*, becauſe a *writ of error was brought upon the original judgment*. The Court were unanimous that the plaintiff might proceed to judgment, but execution to ſtay till the error was determined. Rep. of Pract. in C. B. 24. Trin. 9 Geo. 1. Covert v. Allen.

Like motion  
granted ac-  
cordingly;  
for if the  
plaintiff  
ſhould ob-  
tain judg-  
ment, the  
bail cannot

render the principal. Rep. of Pract. in C. B. Hill. 8 Geo. 2. Newman v. Butterworth.

8. A motion to ſtay proceedings on the bail-bond. The caſe was, one H. being *defendant in the original action was arreſted on a teſtatum capias into Suffolk out of London, and by miſtake the bail was taken, and filed with the filazer of Suffolk*, but ſhould have been filed with the filazer of London. The Court held the proceedings on the bail-bond regular, and would not ſtay them, but upon payment of coſts, and the defendant's giving the plaintiff judgment on the bond to the ſheriff, to ſtand as a ſecurity for the plaintiff's debt, and the original defendant's accepting a declaration, and pleading thereto, and taking notice of trial after term; but the defendant not conſenting to theſe terms, no rule was made. Rep. of Pract. in C. B. 44. Paſch. 1 Geo. 2. Wicking & al. v. Cockſedge.

9. Proceedings on the bail-bond were ſtayed, the plaintiff having *declared in the original action*, and thereby had concluded himſelf. Rep. of Pract. in C. B. 81. Mich. 6 Geo. 2.

## (X) How and when the Bail are diſcharged. [ 489 ]

1. **I**N præcipe quod reddat three were received by reversion by default of tenant for life, and found ſurety, and after at the venire facias returned, by iſſue joined by them, the one of the three was dead, and yet the iſſue and the ſurety remained. Br. Surmiſe, pl. 21. cites 19 E. 4. 4.

M m 3

2. If

Br. Proce-  
dendo, pl.  
73. c. 125 31  
H. 8 S. C.  
Br. Proce-  
dendo, pl.  
1. c. 125 31  
H. 8 S. C.

2. If a man be arrested in London, &c. and finds surety, and after removes the body and the cause by writ of privilege, and is dismissed, the sureties are discharged. Br. Surety, pl. 28.

3. Contra if the plaintiff obtains procedendo, because the defendant did not prove his cause of privilege; for there in effect he was always prisoner to the franchise; contra where he is once dismissed. Ibid.

4. Whether a release to the bail, on a sci. fa. brought against them, is a discharge of the principal? Cur. advisare vult. Cro. E. 890. Trin. 44 Eliz. B. R. Blofield v. Grymes.

5. The plaintiff, by covin and practice with the principal, would charge the bail and free the principal, and therefore the bail was by the Court discharged. Bullst. 43. Mich. 8 Jac. Westley v. Brown.

6. T. A. senior, being arrested in London, and sued there is debt upon an obligation, was removed by bab. corp. into B. R. and put in bail, J. S. the obligee did not declare against him, but declared against T. A. junior (who was also bound in that bond), and had judgment, no bail being filed; and upon a writ of error brought, this was assigned for error; then J. S. moved that the same bail might be filed for T. junior, which was denied by the Court; and now there being 3 terms passed since the bill was put in for T. the elder, J. S. moved that he might be at liberty to declare against him; but that was likewise denied, because every plaintiff ought to proceed by the rule of the Court, within 3 terms after special bail filed; therefore it was ruled that the bail should be taken off the file, and the defendant should not answer. Cro. J. 620. (bis) pl. 11. Mich. 18 Jac. 1. B. R. Ashfield v. King.

2 Lev. 195.  
S. C. and  
judgment  
for the  
plaintiff,  
rifi &c.—  
2 Jo. 75.  
Aitry v.

7. B. was bail for 6 persons, against whom the plaintiff got judgment, and 2 were taken in execution. Adjudged that till all the principals are in execution, the bail is not discharged; for the law expects a complete satisfaction. 2 Mod. 312. Trin. 30 Car. 2. B. R. Aitry v. Ballard.

Paistryman, bail for Ballard, S. C. but S. P. does not appear.—Vent. 315. S. C. adjournatur; but adds that judgment was for the plaintiff.

8. A writ of error on the judgment against the principal is no superfeedas to the proceedings against the bail, though when the first judgment is reversed the other fails. Agreed per Cur. 2 Show. 85. pl. 73. Hill. 31 & 32 Car. 2. B. R. Anon.

9. An infant was bail, and taken in execution at little more than 20 years of age, but was discharged after full proof of his non-age; but the Court held it a matter of discretion to bail him or not, he being in execution; but if he had brought his audita querela before he had been taken in execution, he must have a superfeedas of course. Carth. 278. Trin. 5 W. & M. in B. R. Loyd v. Ogle, and Loyd v. Eagle.

This was  
bail for ap-  
pearance of  
one bound

10. Where a man is admitted to bail, he is by intendment of law in their custody; but when he is taken from the bail by the process of B. R. they are discharged; per Ch. J. but per 3 Just. contra,

tra, that they are not discharged till the committitur entered; for though he is committed on a conviction on an information, the bail on a motion in this court may have him brought up at any time, and rendered back again in discharge of themselves. 8 Mod. 195. Mich. 10 Geo. 1. the King v. the Bail of Strudwick.

to his good behaviour. Ibid.

11. *Bankruptcy* in the principal shall not avoid a judgment regularly obtained against the bail, though the principal, if taken in execution, should have been discharged on producing a certificate according to 5 Geo. 24. 6 Geo. 22. per Cur. 8 Mod. 348. Pasch. 11 Geo. 1. Heavyfide v. Davis.

[ 490 ]

## (Y) Discharged by Death of the Principal.

See (C) pl. 1, 2.

1. **I**N a sci. fac. against the bail they pleaded the death of the principal on the day of the judgment; the Court held they might plead it, because in such case they cannot have a writ of error to reverse the judgment. Cro. E. 199. pl. 20. Mich. 32 & 33 Eliz. B. R. Warter v. Perry.

2 Le. 101. pl. 125. Walter v. Perry and Springe, S. C. The plea was, that the

principal died before judgment; and all the justices (præter Wray) held the plea not good, because it is a surmise against the judgment; for judgment cannot be given against a dead man; but per Wray, the same is error in fact, and of such error the party may have advantage in this court; but it was ruled that the defendants should be sworn that their plea was true.

2. The plaintiff recovered in debt in B. R. and immediately upon the awarding a ca. sa. the defendant died; it was a quære if in such case an action of debt lieth against the special bail; the executors having nothing, a scire fac. doth not lie against the bail; and in C. B. the Court was divided in that case. Godb. 354. pl. 450. Trin. 21 Jac. B. R. Anon.

3. The bond was that if the defendant be convicted in the said action, and does not pay the said condemnation or render his body to prison, that he would pay the debt. In scire facias against the bail, he pleaded that before any ca. sa. sued the defendant died, and judgment was given against the plaintiff; but Hobart was at one time against the judgment when it was moved, because he took it that the defendant in the original action, ought in convenient time after the judgment, to have offered himself, or that otherwise the recognizance was forfeited; but the 3 other justices e contra, because the statute is in the disjunctive, viz. to render his body to prison, or to pay, and the one by death of the party, being the act of God, becomes impossible, and this before any capias sued, which is a demand in law, he is discharged, and afterwards on view of precedents adjudged for the bail. Jo. 29. pl. 1. Pasch. 21 Jac. B. R. Sparrow v. Sowgate.

Hutt. 47. Suggs v. Sparrow, S. C. adjudged accordingly. —Win. 61, 62. S. C. adjournatur, to see precedents. —Godb. 354. pl. 450. Anon. S. P. and seems to be S. C. the Court divided.

4. If the principal dies before the return of the capias, the bail are discharged; but if he dies after the return of the capias and before the return of the sci. fa. they are not discharged, for

If he dies after the return of the capias and before the return of the sci. fa. they are not discharged, for

recogniz-  
ance is for-  
feited.  
3 Salk. 57.  
pl. 9. Anon.

the sci. fa. is as it were but a writ of grace; per Cur. Freeman Rep. 338. pl. 418. Trin. 1673. in Case of Menate v. Coldo.

5. A bail bond is entered into *to appear the 1st day of Michaelmas term; the defendant dies the 10th of Nov. and the 12th Nov. the bond is assigned over, and sued; and upon a motion the suit was staid, paying of costs, for the plaintiff was at no damage upon the defendant's not appearing the first day of the term, for if he had appeared and filed bail, the plaintiff could not have tried his cause that term; so that the defendant dying within the term, the bail ought (as well upon the bail bond, as if they had been put in court to the action) to be discharged.* 2 L. P. R. 254.

[ 491 ] 6. The principal *died before the return of the second sci. fa.* against the bail, and after a *capias* returned against the principal, and it was urged that since the bail would have been discharged by rendering the principal at any time before the 2d sci. fa. returned, and that they were now deprived of that advantage by the *act of God*, it were but reasonable to discharge them; but per Cur. it cannot be, for it is indulgence to allow a render after a *capias* returned in discharge of them; and their recognizance is *forfeited upon the capias returned against the principal*, and the Court will only discharge the bail after, where they render, but not where they cannot; but the death of the party *before a capias returned*, had been a good plea to the sci. fa. and so was the rule. 12 Mod. 601. Anon.

The reason  
why the  
death of the  
principal  
before any  
capias sued  
out, is a  
good plea,  
is, because

7. Sci. fac. against the bail, who *pleaded that the principal died before the return of the capias, &c.* and upon a special demurrer, this was adjudged ill, for it *should be* that he died *before the return of any capias*, that it may appear he was not alive at the return of the first *capias*, for if he was, the recognizance is forfeited. 3 Salk. 57. pl. 10. Hill. 7 W. 3. B. R. King v. Sharp.

the principal had election either to pay the money, or to render his body to prison, and the last is become impossible by the act of God. 2 Salk. 57. pl. 11.

8. The plea of the death of the principal *before the return of the capias* is good, but the *pleading his death generally without confining it to some time is not good*; per Pratt J. 10 Mod. 306. Pasch. 1 Geo. 1. B. R.

But after-  
wards when  
the cause  
came on  
again,  
Pasch. 1  
Geo. 1.  
Pratt J.  
declared  
that though  
upon the first  
argument  
he thought  
the plea  
naught, yet that now he was somewhat doubtful. 10 Mod. 306.

9. In action upon the recognizance of the bail, they *pleaded the death of the principal ante emanationem brevis*; Parker Ch. J. held this an *immaterial plea*; for death before the issuing out of the *capias* is death before the return of it; but if it be found that the principal did not die before the issuing out of the *capias*, it is plainly nothing to the purpose, for notwithstanding this he may die before the return of it; and the others being of the same opinion, the plaintiff would have had his judgment, had not another objection been started. 10 Mod. 267. 269. Mich. 1 Geo. 1. B. R. Weddall v. Jocar.

10. One T. S. was arrested at the suit of H. the plaintiff, and S. the defendant became bail to the sheriff for the appearance of the said T. S. at the return of the writ; but before any further proceedings H. died, yet his attorney took out an assignment of the bail bond, and proceeded to judgment and execution against the bail; and now the Court was moved to set aside these proceedings as irregular, and the matter being so reported by the master, they were set aside. 8 Mod. 240. Pasch. 10 Geo. Hutchidson v. Smith.

11. The principal died after a ca. sa. returned, but before the return of the 2d sci. fa. the bail are chargeable, because it was their omission that they did not surrender him, he being alive at the return of the ca. sa. 2 Ld. Raym. Rep. 1452. Mich. 1726. Parry v. Berry.

Ibid. says a motion was made in the like case in behalf of the bail, and was denied for the same reason. Mich. 1 Geo. 2. B. R. Glyn v. Yates.

## (Z) Discharged by Render of the Principal.

[ 492 ]  
See (B) pl. 1. to 12.

1. A Man condemned in debt renders himself to the Court, and *prays his sureties may be discharged*, and the plaintiff was demanded, for the Court said he may elect either his body, or to take his goods in execution, but by this offer the sureties were discharged. Cro. E. pl. 22. pl. 3. Mich. 25 Eliz. C. B. Anon.

2. After judgment against the principal, he came into court and rendered himself, and prayed that the Court in discharge of his bail would record his render, which was granted; and the Court demanded of the plaintiff, whether he would have execution of the body, who replied he would not, thereupon the Court awarded that the sureties be discharged. Le. 58. pl. 74. Pasch. 29 Eliz. C. B. Fullwood v. Fullwood.

Goldsb. 12. pl. 6. S. C. but S. P. does not appear.

3. Upon a capias against the principal after a judgment in debt, and non inventus returned, a sci. fa. was awarded against the bail, which was returned nihil; and upon a 2d sci. fa. against them, the principal was brought in, and the bail prayed that he might be in execution; but the Court ordered it to be observed as a rule, that if a ca. sa. be awarded returnable the next term, whereon nihil is returned, the principal shall never afterwards render himself in their discharge; but if it be returnable de die in diem, then the body might be brought in upon the first sci. fa. and that there shall be 15 days between the teste and return of the scire facias, so that there may be convenient time to seek the principal. Cro. Eliz. 738. Hill. 42 Eliz. B. R. Alison v. Diston.

Adjudged that though non est inventus is returned upon a ca. sa. against the principal, yet the Court will receive a render. 3 Salk. 26. pl. 8. Anon.

4. The render ought to be in the Court where the judgment is; per Cur. Cro. J. 98. pl. 27. Mich. 3 Jac. B. R. in Case of Hargrave v. Rogers.

5. The plaintiff by practice with the principal would charge the bail, and discharge the principal upon oath (the practice being very flagrant, and both principal and bail being in execution, the bail

bail first, and afterwards the principal) the bail was discharged by the Court. 1 Bulst. 43. Mich. 8 Jac. Westley v. Brown.

2 Bulst. 68.  
Higgins v.  
Sommer-  
land, S. C.  
and the  
whole Court  
agreed that  
if the bail  
be once  
taken in execution, the plaintiff shall never after have execution for any part against the principal.

6. If the principal after judgment renders himself in discharge of his bail, it is still at the election of the plaintiff to take out execution either against him or his bail; but if he takes the bail, though he has not full satisfaction, he shall never afterwards charge the principal. Cro. J. 320. Pasch. 10 Jac. 1. B. R. Higgen's Case.

Roll Rep.  
20. pl. 24.  
S. C. but  
S. P. does  
not appear.

7. After judgment against the principal a *ca. sa.* issued against him, which was returned; but before it was filed a *sci. fa.* issued against the bail. One of them brought an action against the principal, and he being taken upon the process, and brought into court, the bail prayed that he might be delivered in execution for the debt upon the judgment, which was done accordingly, and the plaintiff was enforced by the Court of necessity to pray the body of the principal to be committed in execution for his debt. 2 Bulst. 260, 261. Mich. 12 Jac. Dupont v. Wildgoose.

3 Bulst.  
191. S. C.  
says that af-  
ter judgment  
[ 493 ]  
against the  
principal in  
B. R. he  
brought er-  
ror in Cam.  
Seacc. and  
gave bail  
according to the stat. 3 Jac. to prosecute with effect.

8. Scire facias against the bail on a recognizance acknowledged according to the stat. 3 Jac. cap. 8. for errors brought in actions of debt. The defendant pleaded in bar, that after the writ of error allowed, and before any default, the principal rendered his body in execution. Adjudged per tot. Cur. a good bar, because the principal, who is the plaintiff in the writ of error, may render his body in execution, and so excuse the bail. Mo. 853. pl. 1165. Trin. 14 Jac. Austin v. Monk.

The writ was returnable 3d Feb. and on the 12th of Feb. a *sci. fa.* was brought against the bail on the writ of error, who pleaded that it was returnable 3 Feb. and that on the 2d of Feb. the principal came here into Court, and rendered himself in discharge of the bail, and by order of the Court was committed to the Marshalsea, and yet remains there in execution. The whole Court agreed that the plea is not good; but per Coke, it ought to be that in eadem Curia reddidit se, & per eandem Curiam commissus; for the Court ought to commit him, and rendering himself is not sufficient, unless committed per Curiam in execution, which cannot be in this case, because it appears the 2d day of Feb. which is Candlemas-day, is not dies juridicus; and Haughton J. agreed, and that the being in prison without a render and commitment by the Court, is void; and therefore judgment for the plaintiff. Cro. J. 402. S. C. adjudged accordingly that it is no plea; for this manucaption is not to render his body, but to pay the debt adjudged, which is grounded upon the statute of 3 Jac. cap. 8. that for the avoiding delays in executions, the party who takes a writ of error in debt shall pay the debt, or find sureties to pay the debt, otherwise there shall not be any stay of execution; wherefore it was not sufficient to render the body, but he ought to pay the debt, or his sureties for him, and not to let him to bail, and to render himself when he will. Roll Rep. 202, 203. pl. 13. S. C. and Coke Ch. J. and Haughton J. held accordingly that though he be in prison, yet if it be without render and commitment, all is void; and judgment was given for the defendant in pleading for the plaintiff. S. C. cited Poph. 186. and that the plea was adjudged ill, the render being pleaded to be on a dies non juridicus.

Hob. 210.  
pl. 267.  
Webb v.  
Canning,  
S. C. & S. P.  
a rendering.

9. In scire facias against the bail, he pleaded that the principal reddidit se, and ruled a good plea, and that it shall be tried by the record; and if the attorney for the plaintiff be not in court when he renders himself, the Court shall commit him, ex officio; and if the plaintiff



plaintiff refuse him, he shall be discharged, and entry thereof made on record. Mo. 888. pl. 1249. Wolley v. Davenant.

10. A sci. fa. was brought against his bail, who *pleaded that the principal on such a day rendered himself, and was committed in execution in discharge of his bail. The plaintiff replied that the principal was servant attending upon the Duke of L. a lord in parliament, and that it was fraudulently agreed between the said principal and his bail that he should render himself in time of parliament, that he might be discharged by privilege, which was done accordingly.* Upon demurrer it was doubted by Ley Ch. J. and Doderidge (absentibus reliquis) whether the bail was liable; for the principal may surrender himself before or after judgment in discharge of his bail; and Doderidge said that the pleading had been stronger if it had been alleged, *that before he rendered himself there was an intent to be delivered by privilege, so to defraud the plaintiff, and that after he eligned himself, so that he could not be taken.* Palm. 275. Hill. 19 Jac. B. R. Pinchback v. Buckworth.

If the render appears to be fraudulent, though it has the outward shew of a real one, that should not discharge the bail, as if there was a previous agreement to let him escape, while he should remain in custody of the

tipstaff; per Cur. 7 Mod. 77. Mich. 1 Ann. B. R. in Case of Goodwin v. Hilton.

11. There is a difference between *manuaptors*, which are, *that the party shall appear at the day*; for there the Court will not excuse them to bring the party in before the day; but in case of *bail* they may discharge themselves, if they bring the defendant's body into court at any time before the return of the 2d sci. fa. against the defendant; for when one goes upon bail, it is intended that he is, notwithstanding that, in custodia mareschalli; per Doderidge. Quod nota, Godb. 339. pl. 433. Trin. 21 Jac. B. R. in Case of Gorge v. Lane.

12. A 2d sci. fa. issued against the bail. They *pleaded nul tiel record, and afterwards brought the principal into court, and prayed that he might be in execution, and they discharged.* Agreed by the justices and clerks, that if he had been brought in either before or upon the return of the 2d sci. fa. that he should be in execution, and they discharged; but since they had pleaded to the 2d sci. fa. the Court could not compel the plaintiff in the action to take him in execution. 2 Roll Rep. 367. Mich. 21 Jac. B. R. Cope v. Doughty.

Palm. 392. S. C. accordingly.

13. The principal cannot *render himself out of court to the marshal in discharge of his bail*; for none but a judge can discharge the bail; but in court he may render himself to the marshal well enough. Sty. 330, 331. Trin. 1652. Child v. Lenthall.

The defendant was arrested, and gave a bail-bond to the sheriff, and

*before the day he rendered himself to the marshal.* Per Cur. this may be recorded, and it shall be a good bar to the action brought upon the bail bond; but the usual way is to put in bail before a judge, and afterwards for the defendant to render himself in discharge of his bail, and to get his bail piece to be filed, and discharged upon record. 2 L. P. R. 254.

14. B. was bail for 6 persons, against whom the defendant got judgment. It was agreed that *if 5 had surrendered themselves, yet*

yet the bail had been liable. 2 Mod. 312. Trin. 30 Car. 2. B. R. in Case of Astry v. Ballard.

15 It was moved that the bail, upon his producing the principal, might be relieved against the bail-bond, though a *term had intervened*. Afton said the practice had been both ways, according to the circumstances. Holt, Gregory, and Eyres held that proceedings should stay on the bail-bond; but Dolben said he never knew it done where a term or *assises* intervened; whereupon the Court agreed that they would not relieve the bail in such cases for the future. Comb. 217. Mich. 5 W. & M. in B. R. Anon.

16. If the defendant *reddidit se* in discharge of his bail, the *bail-piece* should be *marked*, otherwise the plaintiff may proceed against the bail. Comb. 263. Trin. 6 W. & M. in B. R. Anon.

17. A. *sued B. in 3 actions*, and he *gave bail to each action*. The plaintiff recovered in all, and then the defendant rendered himself, and one of the bail entered an *exoneretur* on the *bail-piece*, but the *rest* did not. Per Cur. the render is a discharge in posse as to all; but not complete and actual as to all, till an *exoneretur* is entered upon all. 1 Salk. 98. pl. 3. Pasch. 8 W. 3. B. R. Williams v. Williams.

After judgment against the principal, he rendered himself before the return of the *ca. fa.* but did not give the plaintiff notice of it, nor get the *bail-piece* discharged, and the plaintiff proceeds to judgment against the bail upon a *sci. fa.* and the Court would not relieve them upon a motion, because no *exoneretur* was entered, but put them to their *audita querela*. 1 Salk. 101. pl. 14. Trin. 12 W. 3. B. R. Lyell v. Galliey.

It is the practice of the Court, that the bail are not discharged without entering an *exoneretur* on the *bail-piece*, on notice given of the surrender; but if the defendant did not give notice, it is an irregularity which will not be supplied by the Court without paying costs; but if the bail surrendered the principal fairly, though not strictly regular, they ought to be favoured, and are indulged by the Court to surrender him at any time before the return of the 2d *sci. fa.* 8 Mod. 281, 282. Trin. 10 Geo. in Case of Wild v. Harding.

18. Two actions were brought against the same person, and the same persons were bail in both. Per Cur. a *reddidit se* in one action is a discharge of the bail in the other also. 12 Mod. 99. Trin. 8 W. 3. Williams v. Batter.

19. If one surrenders in discharge of bail, before recognizance forfeited, he need not give notice to the plaintiff, but it may be pleaded to the *sci. fac.* against the bail; but where a *capias* is gone, and a *non est inventus* returned, whereby he forfeits his recognizance, if he would ask a favour of the Court, he ought to give notice; per Holt Ch. J. 12 Mod. 236. Mich. 10 W. 3. Anon.

20. Bail upon a writ of error cannot discharge himself upon surrendering his principal. 12 Mod. 319. Mich. 11 W. 3. Shoot v. Higgs.

S. P. because they are bound that he shall prosecute his writ of error with effect, or pay the money, if judgment be affirmed. 3 Salk. 57. pl. 12.

[ 495 ] 21. Upon *non est inventus* returned on the *capias* against the principal, the bail's recognizance in strictness of law is forfeited; but if the defendant renders himself before the return of the *alias sci.*

Debt upon a recognizance

*fi. fa. against the bail*, the Court will stay proceedings, but instead of a *sci. fa.* the plaintiff brought debt against the bail upon their recognizances, who pleaded a *renier* before the return of the latitat; per Cur. though this is not pleadable, yet the Court will allow a reader as well on an action of debt as on a *sci. fa.* and that at any time before the return of the latitat. 1 Salk. 101. pl. 13. Hill. 11 W. 3. B. R. Anon.

given in C. B. brought in B. R. It was moved to have the action discharged, for that the defendants had surrendered

the principal even before the action commenced, and now by a rule of Court here, if debt be brought upon a recognizance of this court, the defendant has 8 days in full term to render the principal, whereby the defendants have now equal advantage in case of debt and *sci. fa.* upon a recognizance. To which it was answered by Dec, that though that be a rule in B. R. yet there is no such rule in C. B. and this being upon recognizance of C. B. we must do in it as would be done there if the action were brought there; and so said the whole Court, that he should have the same saue here as in. C. B. and formerly they would not suffer an action upon a recognizance in this Court, because of the greater mischief it would be to the defendant than a *sci. fa.* but sure the action was always well maintainable, and so no rule is in avoidance of that mischief. It was directed to inquire how the Court of C. B. was, for they must guide themselves hereby in this case. 6 Mod. 132, 133. Pasch. 3 Ann. B. R.

22. Upon the reddidit se the bail are discharged, even upon the *reddidit se* before a judge, but the principal thereupon is not in execution, till the plaintiff has made his election to have him in execution, and upon such election there is a *committitur* entered in the book of the office, and the entry must mention it to be at the request of the plaintiff, and all this is supposed to be in court; per Holt Ch. J. 12 Mod. 584. Mich. 13 W. 3. Watson v. Sutton.

By course of the Court, there ought to be an entry made by the defendant's attorney with all convenient speed in

a book to be kept for that purpose in the office of B. R. to the intent the plaintiff may know how to proceed; that is, to charge the party in execution, or to take a *fi. fa.* or other writ. That by the rule of court, besides this entry, there must be 2 days notice to the plaintiff's attorney before a *committitur* can be entered, or a discharge upon the bail-piece. 7 Mod. 98. Mich. 1 Ann. B. R. in Case of Goodwin v. Hilton.

23. Bail shall have eight days in full term, after return of process against the principal, to render. 12 Mod. 650. Hill. 13 W. 3. Smith v. Oxbrigg.

24. It was offered at the bar, to have been ruled in the case of LEE v. KNIPPE, that the principal ought to be two days in custody, before an entry should be made of a *reddidit se*. 7 Mod. 77. Mich. 1 Ann. B. R. in Case of Goodwin v. Hilton.

25. Per Holt, the *reddidit se* cannot be entered upon the bail piece, for the *scire facias* is grounded upon that, and the *reddidit se* would destroy it; but the remedy of a bail is upon an *audita querela* to be grounded on the *reddidit se*. 7 Mod. 77. Mich. 1 Ann. B. R. in Case of Goodwin v. Hilton.

26. Upon bringing the bail piece to the secondary of the office, and giving him satisfaction that the principal rendered before, or upon the return of the *second sci. fa.* he will give you a discharge or *superseas* of the *sci. fa.* per Holt Ch. J. 7 Mod. 44. Trin. 1 Ann. Anon.

27. The defendant in an indictment in B. R. and being bailed likewise in an action in C. B. rendered himself to the Fleet, in discharge of his bail to the action, and removed himself by *habeas corpus* to the King's Bench, and escaped; upon motion of the bail to the indictment

ment that their recognizances might not be estreated, for that he was taken out of their custody by commitment to the marshal, it was denied; for they might have had him committed in discharge of themselves. 1 Salk. 105. pl. 9. Trin. 1 Ann. B. R. Anon.

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28. 1 Ann. s. 2. cap. 6. *If a prisoner be taken on an escape-warrant, and committed to the county-gaol, his bail may charge him in custody there, by a writ to the sheriff, and it shall be deemed a sufficient render.*

29. *And the sheriff shall return such writ, &c. on pain of 50 l.*

30. It was agreed that the course of render is, upon reddidit se signed by the judge, to get a certificate from the clerk of the papers to the master of the office, which is his warrant to enter a discharge upon the bail-piece; but such certificate does not make the reddidit se better or worse. 7 Mod. 98. Mich. 1 Ann. B. R. in Case of Goodwin v. Hilton.

31. If the bail surrender the principal at or before the return of the 2d sci. fa. it is good, though the plaintiff has not immediate notice of it; but if he is at any further charge for want of notice, the principal shall not be discharged without paying it. 6 Mod. 238. Mich. 3 Ann. B. R. Anon.

32. If at any time after the return of the capias the bail surrenders the principal at a judge's chamber, and thereupon he is committed to a tipstaff, and escapes, or is rescued, this is not a good surrender, because it is an indulgence to the bail to accept it after the return of a capias, and upon such a surrender he ought to be 2 days in the custody of the marshal to make it good; but it is otherwise if the bail surrenders him before or at the return of the capias; because that is matter of right. 6 Mod. 238. Mich. 3 Ann. B. R. Anon.

33. The principal surrendered himself the 2d of May, and notice was given to the plaintiff's attorney. The surrender was before justice Tracy on the 7th of May, and two days afterwards before justice Powis; the bail-piece was discharged on the 4th of May, and the 2d sci. fa. was returnable on the 9th of May. The plaintiff's attorney took the bail-piece from the judge's chamber, and kept it for a considerable time. There was not 15 days between the teste and return of the 2d sci. fa. neither was it 4 days in the office. On this report by the master, to whom a reference was made, the judgment was set aside. 10 Mod. 281. Trin. 10 Geo. in Case of Manning v. Turner.

36. The defendant was bailed before a judge by one person, who surrendered him to the Fleet prison. The plaintiff served the sheriff with a rule to bring in the body. On motion to stay proceedings against the sheriff, a question arose, whether, one person only being bail, the render was effectual or not? And the Court held, that it was not, and refused to stay proceedings against the sheriff; but afterwards 2 bail being put in and justified, proceedings were stayed against him on payment of costs. Plaintiff insisted, that he had been delayed of a trial, and that the bail ought to be bound for the debt, and were too late to render; but Curia e contra,

tra,

tra, because the plaintiff had proceeded against the sheriff as before, and not upon the bail-bond. Barnes's Notes in C. B. 46, 47. Pasch. 6 Geo. 2. Steward v. Bishop.

37. The defendant was surrendered by his bail to B. R. prison instead of the Fleet, by mistake; he was afterwards surrendered rightly, and the bail moved to stay proceedings upon the bail-bond. A rule was made to shew cause, which was afterwards discharged upon hearing counsel on both sides, the plaintiff having been delayed of a trial. Barnes's Notes in C. B. 52. Pasch. 7 Geo. 2. Low v. Ravell.

38. In an action upon a bail-bond, the defendant pleaded *compereuit ad diem*. Issue was joined on nul tiel record, and at the day given for defendant to bring the record of the appearance into court, the defendant produced a record of bail and surrender thereupon, but one person only being bail, it was looked upon as no bail, and plaintiff had judgment. Barnes's Notes in C. B. 171. Mich. 8 Geo. 2. Smith v. Randall.

39. The Court ordered the hour of the day, or true time of the defendant's surrender, to be entered by the filazer, in order that it might appear whether the surrender was made before or after the rising of the Court. Barnes's Notes in C. B. 61. Hill. 9 Geo. 2. Ling v. Woodyer, and cites the Case of Mason v. Bruce, Trin. 7 & 8 Geo. 2.

40. Motion to set aside execution against the bail, it appeared that the defendant was rendered, and the same entered in the judge's book, but not in the bail-piece as usual, the same having been taken away by the plaintiff's attorney, so that the render could not be entered thereon. The Court held the render to be good, and ordered the executions to be set aside, with costs. Rep. of Pract. in C. B. 123. Mich. 9 Geo. 2. Knight v. Winter.

41. Moved to vacate a render, because the defendant would not pay the fees, which were not demanded till after the render made, cites 2 Keb. 2. that it is not a complete surrender till it be entered on record. Ordered, that the entry of the render in the judge's book be struck out. Rep. of Pract. in C. B. 131. Trin. 10 Geo. 2. Huckle v. Ambrose.

Rep. of  
Pract. in  
[ 497 ]  
C. B.  
129. S. 6.  
accordingly.

## (A. a) Of the Bail's rendering the Principal. At what Time.

1. AFTER a *capias* against the principal returned *non est inventus*, and a *sci. fa.* against the bail returned *nihil*, and a 2d *sci. fa.* awarded, and then he brought in a principal; and per Popham, it may be very well, unless the first be returned *warned*, and judgment given thereon for the *sci. fa.* otherwise it would be to little purpose; wherefore the principal was received. Cro. J. 109. Hill. 3 Jac. B. R. Hill v. Saundeford.

2. After writ of error the bail cannot render the principal. Hob. 116. pl. 142. Pasch. 14 Jac. Wickstead v. Bradshaw.

3 Bull. 182. S. C. the first sci. fa. was returned nihil, and the ancient usage being to bring in the principal upon the first sci. fa. the Court disallowed

the bringing him in on the 2d sci. fa. — Roll Rep. 371. pl. 24. S. C. and by Coke and Haughton the writ of error shall not stay the sci. fa. against the bail.

Roll J. said, that out of indulgence to the bail, it has been the use of latter times, that if the bail do bring in the principal *before the return of 2d sci. facias*, which was taken out against the bail, thereupon to discharge the bail; but anciently it was not so, but it was then counted too late to bring him in. Sty. 130. Mich. 24 Car. B. R. Quaterman's Case.

*Before the two sci. facias's* returned the bail may discharge themselves by render of the principal; per the attorney general, and not denied by the Court. 7 Mod. 77. Mich. 1 Ann. B. R. in Case of Goodwin v. Hilton. — S. P. agreed accordingly. 8 Mod. 151. Pasch. 9 Geo. 1.

The practice of B. R. is, that where judgment is obtained against the principal, in such case the bail may surrender him at any time *before the return of the 1st sci. fa. where it is afterwards returned sci. feci*, or at any time *before the return of the 2d sci. fa. where two nibils are returned*. And if the plaintiff proceeds by action of debt on the recognizance, the bail may surrender the principal within 8 days after the return of the writ. 8 Mod. 340. Hill. 11 Geo. in Case of Strong v. How.

Ibid. cites one Tennant's Case, who

[498] had a royal protection, and after a capias returned non est inventus, and a sci. fa. returned against the bail, and before they pleaded they brought him in, and he was committed in execution.

4. In debt, the defendant was condemned, and his bail would have delivered him in execution, but he *had protection during parliament*. Upon capias against him the sheriff returned non est inventus. Scire facias issued against the bail, who brought in the defendant, and prayed that he be in execution, and the defendant was committed in execution. Litt. Rep. 194. Mich. 4 Car. C. B. Bagwell's Case.

If a render be made upon *expi corpus* returned to a ca. fa. the bail may plead this in a sci. fa. upon the recognizance, or in debt upon the recognizance, for the bail may plead all the same pleas in debt upon the recognizance, that they may plead in sci. fa. upon the recognizance; but if *non est inventus*, be returned upon the ca. fa. the condition of the recognizance is broken, and a render can never after be pleaded; nor would the Court heretofore accept such a render, cites \* 3 Cro. 78. Alyson v. Bytton; but a great mischief accrued from this practice; for then they sued a ca. fa. returnable the next day, so that the bail had no time to bring in the body; to prevent which mischief, the judges indulged the bail so far as to permit them to render the body upon the return of the first sci. fa. if the ca. fa. was returnable *de die in diem*, cites † 3 Cro. 618. But if the ca. fa. was returnable *at the next summons*, then the bail was held strictly to render the principal upon the return of the ca. fa. and not after, cites \* 3 Cro. 718. But when Popham was made Ch. J. he extended his favour so far, as to admit a render any time before the return of the 2d sci. fa. or upon the 2d *sedente Curia*; but this was disallowed, cites † 3 Bull. 182. Mo. 850. the Spanish Ambassador v. Gifford. But the practice in B. R.

5. By the course of C. B. the Court after scire facias returned receives the body; but in B. R. after *non est inventus* returned, they will not permit the bail to bring in the defendant; per Harvey, and Brownlow the chief prothonotary; nor *after imparlance*, as the reporter says he understands. Litt. Rep. 194. Mich. 4 Car. C. B. in Bagwell's Case.

\* See (Z) pl. 3. Alyson v. Difton, S. C.  
† See (B) pl. 4. Walmsley v. Havand, S. C.  
‡ See supra, pl. 3. Don Serviente D'acune v. Gifford, S. C.

This continued, and is now used as Popham had established it; so that they always admit a render upon the return of the 2d *scire facias* *fedate Curia*, or any time before. So if *sci. feci* be returned upon the first *sci. fa.* then the render must be upon that return; but all the admittances of these renders are *ex gratia Curie*, and not *ex merito justitie*; for the condition of the recognizance is broken by the non-render upon the return of the *ca. fa.* and therefore these renders can never be pleaded, but the party must be relieved by motion. It is said, Litt. Rep. 194. that by the course of C. B. a render may be made after the return of the *sci. fa.* but the Court now doubted of that, and Cook Ch. Prothonotary said, that the practice was always contrary. But Powell J. said he remembered, that Mr. J. Twifden cited a case in B. R. where the render was made upon the day of the return of the 2d *sci. fa.* but it was at a judge's chamber after the Court was up, and that render was disallowed. But Treby Ch. J. said, that it seemed to be a good render. And Cook Ch. Prothonotary certified to the Court, that such renders had been frequently allowed; and a rule was made to stay proceedings upon the *sci. fa.* *Ld. Raym. Rep. 156, 157. Hill. 8 & 9 W. 3. C. B. in Case of Wilmore v. Clerk and Howard.*

6. The Court was moved, that the bail to an action might be discharged, because they had now brought in the principal, and it was but one day after the return of the writ; but Roll Ch. J. answered, that it may not be, because they come in upon the return of the 2d *scire facias*. *Sty. 425. Mich. 1654. Barker v. Weston.*

7. In case a man absconds, and his bail cannot find him, they shall have a warrant or tipstaff to take him out of White-Friars or other pretended place of privilege, in order to surrender him, because he is a prisoner to the Court, and they may call him at pleasure &c. per Ch. J. 2 Show. 202. Pasch 34 Car. 2. Anon.

8. Debt upon bond conditioned, that *J. F. shall appear coram justiciariis apud Westm. &c.* The defendant pleaded, that before the day of appearance he did render himself &c. Upon a demurrer it was objected, that it was ill; for where the condition of a bond is for appearance at a day certain, if he appear before it is not good. But the Ch. J. held, that if the party renders himself to the officer before the day of appearance, he is to see that he appear at the day, either by keeping him in custody, or letting him to bail, and if he does not appear, it seems to be the default of the plaintiff who had his body before the day of appearance. 3 Mod. 87. *Mich. 1 Jac. 2. B. R. Pawley v. Ludlow.*

2 Show. 443. Pawling v. Ludlow, S.C. adjudged for the defendant, —Comb. 4. Hawley v. Ludlow, S. C. and by the Ch. J. such surrender shall discharge the bail;

for the body being rendered the arrest has its effect.

9. The Court will receive a render upon the return of the first *sci. fa.* against the bail, and so they will upon the 2d *sci. fa.* so as it be done on the day of the return, either sitting the Court, or afterwards at a judge's chamber; but though the Court does receive such renders in favour of the bail, yet it is *de mera gratia*, and not de jure, and therefore the bail cannot plead such render to a *sci. fa.* brought against them. 3 Salk. 56. pl. 8.

On a motion to set aside a [ 499 ] render made after the rising of the Court, it was declared to be the opinion of this

Court of B. R. and settled as law, that no render was good unless made after the rising of the Court on the appearance day of the *sci. fa.* returned *scire feci*, or of the 2d *sci. fa.* returned *nihil*, and so all arrests made, and process served, after the rising of the Court on the return day, are irregular. *Rep. of Pract. in C. B. 53. Trin. 2 & 3 Geo. 2. Vandereeth & al' v. Waylet.*

10. Debt on the recognizance against the bail, who had rendered the principal before the return of the *latitat* against them.

The Court were of opinion that this is equivalent to a render before the return of the 2d sci. fa. when the plaintiff proceeds that way, and ruled to enter an *exoneretur* on the bail piece notwithstanding the plea, replication and demurrer before this motion. Carth. 515. Trin. 9 W. 3. B. R. Dodson v. King.

11. At the end of Hill. Term 13 W. 3. Holt Ch. J. said, that the judges had made a rule that if the plaintiff in the original action brings *debt* against the bail upon their recognizance, the bail shall have 8 days after the return of the writ to render the principal; and if there are but 4 days in the following term after the return of the writ, he shall have 4 days in the following term. Ld. Raym. Rep. 721. Hill. 13 W. 3. in Case of Milner v. Petit.

The principal cannot be rendered after plea pleaded. Agreed.

12. Bail may render the principal when they please, and may take him up on a Sunday, and render him the next day; per Cur. 6 Mod. 231. Mich. 3 Ann. B. R. Anon.

Agreed. 7 Mod. 85. Mich. 1 Ann. B. R. in Case of Hall v. Hill.

The bail may surrender the principal before or on the appearance-day of the return of the action on the recognizance, where plaintiff proceeds that way; or if the proceedings against them be by sci. fa. before or on the appearance-day of the return of the sci. fa. fitting the Court in case of a sci. feci returned, or the appearance-day of the return of the 2d sci. fa. fitting the Court, in case of 2 nibils returned. Barnes's Notes in C. B. 83. Patch. 12 Geo. 2. in Case of Derisley v. Deland.

13. The Court held, that in an action of *debt* upon a recognizance the bail have till the rising of the Court on the appearance-day of the writ to render the defendant. Rep. of Pract. in C. B. 23. Mich. 8 Geo. 1. Wright v. Dingley.

14. An action of *debt* was brought on the recognizance against the bail, the writ was returnable the *essoign-day* of the term, and the principal was surrendered, and an *exoneretur* entered on the bail-piece the 14th day of Jan. so it was moved that the bail might be discharged, and they were discharged accordingly. 8 Mod. 340. Hill. 11 Geo. in Case of Strong v. How.

15. After notice of a writ of error, the plaintiff cannot take out a *capias* against the principal in order to proceed against the bail; and a resolution 4 Ann. to the contrary was thought per Raymond Ch. J. to be against reason. Gibb. 175. Mich. 4 Geo. 2. B. R. Sweetapple v. Goodfellow.

16. A motion to discharge a judge's *summons* to stay proceedings on a bail-bond on a suggestion that the defendant had surrendered himself in discharge of his bail. It appeared that *exception* was taken to the bail, and that the render was made before justification, so that the same was irregular, and did not warrant the suggestion in the summons, wherefore the Court set the same aside. Rep. of Pract. in C. B. 58. Mich. 4 Geo. 2. Gwinnell v. Procter.



(B. a) Punishment of refusing Bail, where it ought to be granted; or taking insufficient Bail.

1. **DEBT** upon the statute 23 H. 6. *tam quam &c.* for that the plaintiff being arrested in a suit in the Court at Nottingham, and there committed to prison, offered sufficient bail to the mayor, keeper of the said prison, which bail he refused to accept, and kept him in prison contra formam statuti. Upon nil debet pleaded, the plaintiff had a verdict. It was moved in arrest, that the statute of 18 Eliz. cap. 5. that no action shall be brought, [for any penalty on any penal statute] but by information or original writ, and not otherwise; whereas this is by bill of debt, and therefore judgment was given for the defendant, though it was urged that the plaintiff here was the party grieved. Cro. E. 76. pl. 36. Mich. 29 & 30 Eliz. B. R. Widdow v. Clerke.

Mo. 247. pl. 390. Udeson v. the mayor of Nottingham, S. C. per Cur. accordingly — 3 Inst. 194. cites Widdow v. Clark, S. C. that by reason of the negative words in the said stat. 18

Eliz. it was adjudged that the action being by bill, and not by information or original, quod querens nil capiat per billam. — Cited as adjudged accordingly in Case of Woodson v. Clark, S. C. Arg. 6 Rep. 19. b. in Gregorie's Case. — S. C. cited by the name of Winston's Case, Sty. 381. 382. And Roll Ch. J. said it does not appear whether the stat. 18 Eliz. cap. 5. intended to oust B. R. of its jurisdiction or not, but it is left at large in the statute, and he thinks it an original action; and that PLAT's CASE is, that an original action may be by bill; and he conceives that the statute intended only to exclude inferior courts, and the constant course is, that the party being in custodia marshalli, he may be proceeded against by bill; and we will not suffer this court to be excluded from its jurisdiction by obscure words in the statute: And in the principal case there gave judgment accordingly for the plaintiff, Nisi. Pasch. 16/33. Hill v. Dechair.

2. In *falsè imprisonment* the defendant justified under a latitat. The plaintiff in his replication confessed the latitat; but farther set forth, that after the arrest, and before the return of the writ, he tendered sufficient bail, which the defendant refused. Upon issue joined it was found for the plaintiff. It was moved that though it is an offence in the defendant to refuse bail, yet it is not within the statute 23 H. 6. cap. 10. because a sheriff's bailiff is not an officer intended in that statute, and the taking being by lawful process, he could not be a trespassor ab initio. Said per North Ch. J. if the writ and warrant are good, then the refusing bail is an offence within the stat. 23 H. 6. and a special action on the case had been the proper remedy against the sheriff, but not against the officer. 2 Mod. 31. Pasch. 27 Car. 2. C. B. Smith v. Hall.

3. Where the sheriff takes insufficient bail, and the plaintiff will not accept them, he is liable to an action as well as to amercements; per Holt Ch. J. 1 Salk. 99. pl. 6. Hill. 10 W. 3. Etherick v. Cooper.

Ld. Raym. Rep. 425. S. C. & S. P. by Holt Ch. J. —

Said it had been adjudged in Ch. J. Glin's time, that if the sheriff takes insufficient bail, and has not the party at the return of the writ, an action would lie against him; but the contrary has been since held in C. B. It was indeed always agreed, that an action would not lie for taking insufficient bail; but it was not settled whether it would not lie for taking insufficient bail and not having the party at return of the writ; for though the statute commands him to take reasonable bail, yet if he has not the party he shall be amerced, and the statute does not exempt him from that. 6 Mod. 122. Mill. 2 Ann. B. R. in Case of Grovenor v. Soame.

Holt Ch. J.

4. If a prisoner, that is bailed by insufficient sureties, appears according to the condition of the recognizance, it seems that those who admitted him to bail are safe, inasmuch as the end of the law is answered, and the appearance of the prisoner as effectually procured by such sureties as if they had been ever so sufficient. 2 Hawk. Pl. C. 89. cap. 15. S. 6.

[ 501 ] (C. a) What Recovery against the Bail shall be a Discharge of the Principal.

1. **S**CIRE facias to have execution of damages recovered, in an appeal the defendant pleaded that after judgment the plaintiff brought a sci. fa. against the bail, and had judgment and execution awarded against them; upon demurrer this was adjudged no plea, because the defendant did not shew that the plaintiff was satisfied by the execution against the bail, for he may always charge the principal till he is satisfied. Cro. J. 549. pl. 9. Mich. 17 Jac. B. R. Freeman v. Freeman.

(D. a) Declaration.

1. **D**EBT upon recognizance entered into by the bail, the plaintiff declared that in Mich. Term he had judgment against their principal, and that in Easter Term before the defendants became bail by recognizance conditioned &c. in placito præd'; but did not set forth, that there was any action pending in East. Term; but per Cur. the common form is so upon a sci. fa. against the bail, and the like may be in an action of debt upon the recognizance. 6 Mod. 159. Pasch. 3 Ann. B. R. Perkins v. Chaterton.

2. In debt upon a recognizance of bail, the plaintiff had declared in the short manner now practised, without setting out the condition of the recognizance; the Court declared no opinion, but seemed inclinable to think that the condition of the recognizance does not operate by defeasance, but in part of the recognizance itself, and that the plaintiff ought to set out the condition in his declaration; and ordered the plaintiff to file the record of the recognizance, but gave him liberty to withdraw his former declaration, and declare de novo if he thought fit. Notes in C. B. 248, 249. Hill. 6 Geo. 2. Androven v. Baffen.

3. Plaintiff declared on a recognizance of bail, without setting forth the condition, defendant demurred generally. Court gave judgment for the plaintiff; the recognizance in the declaration does not appear to be conditional, but absolute; if conditional, defendant might have pleaded nul tiel record. Notes in C. B. 246. Mich. 11 Geo. 2. Crosse v. Porter.

(E. a)

(E. a) Pleadings. In General.

1. IT is no plea for the bail to say that the *principal was arrested at another man's suit, and had to prison*; for which reason he could not render him. Arg. 2 Mod. 28. cites 22 E. 4. 27.

In sci. fa. against the bail, they pleaded in bar that the

plaintiff had arrested the principal in an inferior court, by reason whereof they could not bring the body into court. This was adjudged no plea; for they might remove the body with an habeas corpus cum causa, or pay the condemnation-money in the inferior court, and to discharge the party from thence, and bring him into court. Mo. 400. pl. 524. Pasch. 37 Eliz. B. R. Mariball v. Vincent.

\* [ 502 ]

2. Bail was given that A. upon 8 days warning, shall appear to any action to be brought by B. for such a debt; and if A. shall be condemned in the suit, and not pay it, then the bail would answer B. the condemnation. B. brought action against A. in which A. was condemned, and did not pay, by reason whereof B. brought debt against the bail upon the recognizance, and set forth the suit against A. and the condemnation, and that he had not satisfied it; but shewed not that A. had 8 days warning to appear to the action; and Fenner and Yelverton held that he need not shew it; but Popham, Gawdy, and Williams were of the contrary opinion; for A. is an estranger, and the bail is bound only to answer such condemnation in such action only as shall be brought upon the 8 days warning given; for that is the ground of all, and there is no reason that A. by his voluntary appearance, without 8 days warning, should prejudice his bail. Brownl. 85. Mich. 2 Jac. Hargrave v. Rogers.

Cro. J. 4. pl. 14. S. C. and the Court held accordingly, and rule was given that judgment be entered for the defendant; but by direction of the Court the action was discontinued, and the defendant appeared to a new action — Yelv.

52. S. C. in totidem verbis with Brownl. — Cro. J. 97. pl. 27. Mich. 3 Jac. 9. C. says the plaintiff replied that he gave notice, and found for the plaintiff; and that it was moved in arrest of judgment, that this recognizance was not well taken, it being before an action brought. But per Cur. it is the course to take such recognizance where the cause is removed by H. b. Corp. and this Court ought to take consueance of the course of the Court of C. B. but notwithstanding that and several other exceptions, the plaintiff had judgment.

3. In sci. fa. against the bail, the defendant pleaded, that the principal was dead before the sci. fa. brought. Upon a demurrer because he did not allege when he died, nor that he died before the capias brought against him, the plea was held ill; per tot. Cur. Cro. J. 97. pl. 26. Mich. 3 Jac. B. R. Williams v. Vaughan.

Mo. 775. pl. 173. S. C. adjudged. — S. C. cited Hutt. 47. — S. C. cited Poph. 186. — S. C.

cited Arg. 2 Mod. 28. — Sty. 324. Arg. S. P.

4. The principal was in execution, and a committitur entered, and after a sci. fa. was brought, and two nihilis returned against the bail, and judgment upon the sci. fa. and now they come and move to set it aside, but the Court would not, it being the act of the Court, and the party should have come and pleaded it upon the scire facias. Skin. 120. pl. 16. Trin. 35 Car. 2. B. R. Anon.

5. In scire facias against the bail, they plead in bar, that after judgment against the principal a ca. fa. issued against him, directed to the sheriffs of London, who returned Non est inventus, and thereupon

*ventus*, the bail cannot plead a render, but *must be relieved upon a motion*; for the admittances of all such renders are *ex gratia Curiae*; and not *ex merito iustitiæ*; for the condition of the recognizance is broken by the non-render upon the return of the *ca. fa.* Ld. Raym. Rep. 156, 157. Hill. 8 & 9 W. 3. *Wilmore v. Clerk*,

As to the  
Process and  
Proceedings.

But upon  
like matter  
being shown  
to the Court  
and that bail  
was taken,  
therefore  
prayed to be  
discharged;  
Wray J. said,  
they shall be  
put to the writ  
of error,  
for being but  
error in process  
we may reverse  
our own judgment.  
4 Le. 36. pl. 99. Mich. 27 Eliz.  
B. R. Anon.

11. In error by the bail it was assigned that judgment was given against him, where *no capias was awarded against the principal* before the *sci. fa.* was awarded against him; it was held that the writ of error well lay for the bail and the judgment in the *sci. fa.* was reversed. Cro. E. 733. pl. 65. Mich. 41 & 42 Eliz. in Cam. Scacc. *Price v. Price*.

12. A. brought debt against D. and recovered in B. R. then D. brought error in Cam. Scacc. and found *furatives to prosecute* with effect; afterwards for not prosecuting, &c. a *sci. fa.* was brought against the plaintiff in error, who appeared and was taken in execution, and now a *sci. fa.* was brought against the bail; it was moved that they were discharged by the appearance of the plaintiff in the writ of error; per Coke, if this bail upon the writ of error are of the nature of bail at common law in an action, they are discharged, but it is otherwise if they are bail for the debt; but ordered this matter to be pleaded, and then they would advise. Roll Rep. 361. pl. 13. Pasch. 14 Jac. B. R. *Askew v. Downes*.

Jo. 306. pl.  
4. S. C. but  
S. P. does  
not appear.

13. Error by the bail of the principal judgment, and also of judgment upon the *sci. fa.* & *redditione executionis superinde*, and was assigned in the judgment in the *sci. fa.* against the bail was, that *no capias was awarded against the principal*; all the judges, except Hobart, held that it is all one in B. R. and C. B. that a *capias* ought to be against the principal, and returned *non est inventus*, otherwise no *sci. fa.* ought to be against the bail; for if the principal be taken on the *capias* or he renders himself, no execution ought to be against the bail. Cro. C. 481. pl. 4. Mich. 13 Car. B. R. *South v. Griffith*.

14. A *sci. fa.* was brought against the bail for the plaintiff in error, who pleaded, that the plaintiff in error did not prosecute it with effect; the plaintiff in the *sci. fa.* replied *protestando*, that he did not prosecute the writ of error with effect, *pro placito*, that the judgment was affirmed by the Justices of C. B. and the Barons de Gradus de la Coise, & *hoc paratus est verificare per recordum*; the defendants demurred, because it was not alleged that 6 were present when the judgment was affirmed, which is expressly required by the 27 Eliz. cap. 8. *sed non allocatur*; for the defendants should then have pleaded *nul tial record*, for if there were not six their proceedings were

were coram non judice. Vent. 75. Pasch. 22 Car. 2. B. R. Barret v. Milward.

15. In *sci. fa. by administrator*, the bail pleaded that the testator did not sue out any *capias* against the principal, and does not say that neither the intestate nor administrator did; for if the administrator did, it is well enough; the Ld. Ch. J. said, that perhaps this *prima facie* may be good, and if the administrator has sued out any *capias* it may come properly on his part to allege it. Freem. Rep. 338. pl. 418. Trin. 1673. Menate v. Collo.

16. *Sci. fa.* against the bail of H. they pleaded that the original was laid in the county of York, in which action so laid, there was no judgment against H. but that the judgment upon which this *sci. fa.* was brought was had against the said H. on an action laid in the county of the city of York, &c. and so the bail not liable. The Prothonotary being asked informed the Court, that though by the course of the Court the plaintiff might declare in other courts against the same parties, and the judgment would be good, yet by such variation of the county, the bail is discharged, and not liable to the damages in the new declaration, and judgment was given for the defendant. 3 Lev. 235. Trin. 1 Jac. 2. C. B. Yates v. Plantin. [ 507 ]

17. *Sci. fa.* against the bail, upon a *recognizance* conditioned, that if judgment should be had against the principal that he should pay the money, or render his body to prison; the plaintiff set forth that he had recovered, &c. but that the principal did not pay the money or render himself; the bail pleaded, that there was no declaration delivered against the principal within two terms after the *recognizance*; upon demurrer the plaintiff had judgment; for though by the course of the Court, if the defendant lie in prison two whole terms, without any declaration against him, he may be discharged by a rule, yet if a declaration be afterwards delivered, and judgment thereon, 'tis good, and the bail will be liable. 2 Vent. 143. Hill. 1, & 2 W. & M. C. B. Dod v. Dawson.

The defendant before declaration delivered obtained an injunction, which after several terms was dissolved, and then the plaintiff delivers his declaration, and had judgment by default,

and a *sci. fa.* being brought against the bail, they pleaded that there was no declaration delivered within two terms after the action commenced; but the Court upon demurrer held the bail liable in case the plaintiff declares soon after the injunction dissolved. 3 Mod. 274. Hill. 1 W. & M. in B. R. Doe v. Dawson.

18. In *sci. fa.* against bail, the defendant pleaded that no *capias* issued against principal; the plaintiff replied, that a writ of error was sued, and therefore he could not sue a *capias*, &c. the defendant demurs; and per Powell Justice, error upon the principal judgment is no bar to hinder the suing of a *capias* in order to charge the bail, and it was so adjudged in this Court very lately; judgment for the defendant. Ld. Raym. Rep. 342, 343. Pasch. 10 W. 3. Ward v. Bendall.

19. M. and W. were bail for J. S. at the suit of R. who obtained a judgment for 200 l. M. died, and a *scire facias* was brought against his executrix and W. the other bail. Afterwards

2 *ad sci. fa.* issued, and 2 *nihils* returned. Judgment by default was against W. The executrix *protestando* that she had fully administered, and had not assets, pleaded in bar that there was no *ca. fa.* against the principal before the first *sci. fa.* Plaintiff replied that he did prosecute a *ca. fa.* against the principal, returnable *Craft. Trin.* upon which the sheriff returned *non est inventus*. The defendant *protestando* that the replication was insufficient, rejoined that *ca. fa.* was delivered to the sheriff after *Craft. Trin.* and after the 1st *scire facias* issued, &c. and traversed that it was delivered to the sheriff at any time before the return thereof. Upon demurrer it was adjudged that the traverse of the time was not material; for if the writ is actually out, and the sheriff makes a warrant before it is delivered to him, it is legal. 2 *Lutw.* 1283. *Mich.* 10 W. 3. C. B. Redman v. Idle.

2 *Ld.*  
Raym. Rep.  
1096. Chol-  
mondley v.  
Bealing,  
S. C. says  
the writ was  
sued out 2  
years after  
the judg-  
ment, and  
adjudged for  
the plaintiff.

20. *Sci. fa.* against the bail, who pleaded that there was no *ca. fa.* against the principal. The plaintiff replied, and set forth a *ca. fa.* and *non est inventus* returned; but it appeared that it was tested a year after the judgment, and no *sci. fa.* appearing it must be accounted illegal; but per Holt Ch. J. the want of a *sci. fa.* previous to a *ca. fa.* after a year, is but error, of which the bail cannot take advantage. 6 *Mod.* 304. *Mich.* 3 Ann. B. R. Cholmondley v. Vcale.

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21. In *sci. fa.* the plaintiff declared that he had recovered against R. and the defendants became bail that he should either pay, &c. or render himself to the prison *marescalli mareschalsie nostrae*, &c. Upon Oyer the recognizance was, that R. should pay, &c. or render himself to the prison *marescalli mareschalsie domine regine coram ipsa*, &c. Then they pleaded that there was no *ca. fa.* returned against the principal. The plaintiff replied that there was a *ca. fa.* returned, &c. and set it forth. On demurrer it was objected, that there was variance between that writ and the recognizance; for the writ and declaration was, that the defendant in the original action should render himself prisoner to the marshal *mareschal' nostrae*; and the recognizance was to the marshal *mareschal' domine regine*; but adjudged, that this being a *sci. fa.* upon a recognizance of bail taken in B. R. the marshal must be intended the marshal of this court, and not of the prison of the palace. 2 *Salk.* 602. pl. 12. *Trin.* 4 Ann. B. R. Ball v. Russell.

2 *Salk.* 602.  
pl. 12. S. C.  
& S. P. ac-  
cordingly.

22. In *sci. fa.* against the bail it was objected, that it appeared by the *capias* set out in the replication that there were but 5 days between the teste and return of it; whereas every *capias* sued out against the principal, in order to charge the bail, ought to have 8 days between the teste and return, and ought to be 4 days in the sheriff's office; which the Court agreed to; but said it was only an irregularity in proceeding, and therefore the defendants should have moved the Court to have them set aside for the irregularity; but in point of law the Ch. J. said, process in the Court may be made returnable *de die in diem*, especially process which

goes into Middlesex. *Ld. Raym. Rep. 1177. Trin. 4 Ann. B. R. in Case of Bail v. Ruffel.*

23. Judgment was entered against the principal thus, *Ideo videtur justiciariis, that the plaintiff should recover his debt, &c.* Whereupon a *sci. fa.* was brought against the bail, and a good judgment against them. They brought a writ of *error* to reverse the judgment against them, *because judgment was entered against them before a good judgment was entered against the principal*; for *videtur justiciariis, &c.* is no judgment, and the Court held that the judgment should be reversed. 2 *Le. 1. pl. 2. Mich. 32 & 33 Eliz. B. R. Thacker v. Dampport.*

*Error in Judgment against the Principal.*

*Judgment on a sci. fa. was given against the bail, who brought a writ of error as well*

*upon the principal judgment as upon the judgment in the sci. fa. but it was quashed, because they were not parties to the original judgment. 5 Mod. 397. Pasch. 10 W. 3. Atwood v. Duell.*

## (G. a) In Criminal Cases.

1. ONE indicted and found guilty of the *death of a man by misadventure*, as by casting a stone over a house, and by chance killing a man, woman, or child, is not bailable. *Coke of Bail, &c. cap. 5. cites 3 E. 3. Corone 354.*

2. So if one indicted be found guilty of the death of a man *se defendendo*, he ought not by law to be bailed; for according to Bracton's rule, *inveniuntur culpabiles*. *Coke of Bail, &c. cap. 5.*

3. One indicted of *conspiracy*, viz. That he with others conspired falsely to *indict another of murder or felony*, by means whereof he was indicted, and afterwards convicted, shall not be bailed. *Coke of Bail, &c. cap. 5. and says that this was the resolution of all the Judges, upon the question demanded by King E. 3. himself, as appears 27 Aff. 1.*

4. One indicted for *burglary* may be bailed. *Coke of Bail, &c. cap. 5. cites 29 Aff. 44.*

5. One indicted or appealed of *robbery* may be bailed. *Coke [ 509 ] of Bail, &c. cap. 5. cites 44 E. 3. 3.*

6. One indicted or appealed of *rape* may be bailed; yet that was no felony at common law till the stat. Westm. 2. cap. 34. *Coke of Bail, &c. cap. 5. cites 44 E. 3. 38.*

7. Appeal in B. R. against R. for *stealing 8 pigs*, and it was awarded that the defendant shall remain, without being let to mainprise, because it was reported to the Court by a solicitor that he was not of good fame, and he said that he bought the pigs of two men; and it was said by the justices, that if he could bring in any proof that he bought them, that then he should go by mainprise; and the same if those, of whom he said he bought them, would come and testify that they sold them to the appellee. *Br. Corone, pl. 162. cites 16 E. 4. 5.*

8. A man was taken by *capias utlagatum* in felony by name of J. S. Gent. who said that his name is Yeoman, and not Gentleman, and so is not this person who is outlawed; and had the plea; and because it was in appeal, *scire facias* was awarded against the appellant, if he could say any thing against this plea, and the defendant was let to bail. Br. Utlagary, pl. 42. cites 5 H. 7. 16.

Therefore one convicted of felony is not bailable; for as to him 2 juries have passed upon him, and it is evident that he is guilty. Jenk. 219. pl. 68.

9. The intendment of law in bails is, that it stands indifferent whether he be guilty or not, till trial, &c. D. 179. pl. 42. Pasch. 3 Eliz. 3.

A man committed by the King's counsel is not bailable; and the stat. Westm. 1. says that one committed by the King's command is not bailable, and Stamford expounds this command to be per concilium regis; for the council is

10. If a person be committed by her majesty's commandment from her person, or by order from the council-board, or if any one or 2 of her council commit one for high treason, such persons so in the Case before committed, may not be delivered by any of her Courts without due trial by the law, and judgment of acquittal had; nevertheless the judges may award the queen's writs to bring the bodies of such persons before them; and if upon return thereof the causes of their commitment be certified to the judges, as it ought to be, then the judges in the cases before mentioned ought not to deliver him, but to remand the prisoner to the place from whence he came, which cannot conveniently be done, unless notice of the cause in generality, or else specially, be given to the keeper or gaoler that shall have the custody of such prisoner; and to this all the judges and barons, &c. did subscribe their names, and delivered one to the Ld. Chancellor, and one other to the Ld. Treasurer. And. 298. pl. 305. Pasch. 34 Eliz.

incorporated in the King, and cites 23 H. 6. 28 b. POINER'S CASE, [Poignes's Case] where the return was that he was imprisoned virtue warrant of the council, and held by all the justices that he is not bailable, though 2 only of the council committed him; per Coke Ch. J. Roll Rep. 134. Holt Ch. J. said that the resolution in And. 297. was by all the judges, upon a meeting to assert the liberties of the subject, and was entered in the council-book for their direction. Comb. 343. Mich. 7 W. 3. B. R. in Case of the King v. Kendall and Roe.

But Ibid/ says, it appears in 28 E. 3. 94. that in such

11. If a man be indicted as *principal of the death of a man* he is not to be bailed, but if indicted as *accessory before or after* he is bailable. Coke of Bail, &c. cap. 5.

case, if one is indicted as principal, and the other as accessory, and the principal has judgment of death, or is outlawed, the accessory is no ways bailable; but all this is to be understood of judgment at the King's suit; for in appeal of murder, or death of a man, the law alters in some cases; but that this seems to rest much in the discretion of the justices on considering the circumstances of the offence.

One indicted as *accessory for receipt of any person outlawed*, or otherwise *attainted of murder or felony*, is not bailable. Coke of Bail, &c. cap. 5.

[ 510 ] 12. If one be *appealed by an approver*, and be of good and honest fame, he may be bailed during the life of the approver, Coke of Bail, &c. cap. 5.

13. One indicted for *putting out eyes*, or *cutting out of tongues*, may be bailed. Coke of Bail, &c. cap. 5.



14. The defendant was indicted for *murder*, and the trial coming on, the *prosecutor* alleged, that there had been great labouring of the jury, and therefore did not proceed, suspecting a partial jury, but brought an appeal, and though by the appeal the indictment still continued, and was not gone, yet the delay being occasioned by the prosecutor the party was bailed; but by Crooke J. if the labouring the jury had been proved, peradventure he would not be bailable. Bult. 85. Mich. 8 Jac. B. R. Morgan's Case.

15. The jury on an indictment of *murder* found a *special verdict*, whereupon the Court were divided, 2 against one, and thereupon the prisoner moved to be bailed, but all the Court denied it; and as for the verdict there was a Curia advisare, and the matter adjourned, and the prisoner carried away in custody. Bult. 89. Mich. 8 Jac. Morgan's Case.

16. A precedent was shewn where a man was indicted for *high treason*, and bailed. Bult. 85. by Crooke J. Mich. 8 Jac.

But Ld. Coke in his Treatise of Bail and

Mainprise, cap. 5. par. 1. says, that one imprisoned for high treason is not bailable or mainprisable, and says he takes it to be the same of *petty treason*, as where the wife kills her husband, or the servant his master &c.

Coke Ch. J. said, that they might bail one in B. R. for *treason*, but that they would not do it. 3 Bult. 113. Mich. 13 Jac. obiter.

The King's Bench may bail for *high treason*, but it is a special favour, and not done without the consent of the attorney general. Comb. 111. Pasch. 1 W. & M. in B. R.

17. If the Court of B. R. commits a man, or if the chief justice of B. R. commits a man, he is not bailable by any, though no cause be declared, and peradventure there is a cause which touches the state, and which is not convenient to be known. Roll Rep. 134. Hill. 12 Jac. B. R. in the Brewer's Case.

18. The defendant was found *guilty of manslaughter on the coroner's inquest*, and moved to be bailed, because there was no indictment, but denied; and per Coke and Haughton, the statute of Westm. is, that no bail shall be taken, but that must be intended no ordinary bail; and the statute of Queen Mary is, that bail shall be taken where the party is bailable by law in manslaughter, so that it appears he is not bailable at all if he confess the fact, or if it is notorious. Roll R. 268. pl. 43. Mich. 13 Jac. B. R. Poynes's Case.

3 Bult. 113. S. C. & S. P. by Coke and Haughton; and Coke said, that for the death of a man he would not bail any one, unless by the King's command.

—The King's Bench may bail for *murder*, but it is seldom done, and not without a special reason, and it is not a sufficient reason that it was found manslaughter before the coroner; for it may be afterwards found murder; per Cur. Comb. 111. Pasch. 1 W. & M. in B. R.

19. Bail was allowed in *murder*, because the prisoners were in danger of starving, and no trial could soon be had, though it was against the statute, but it may have a favourable construction at the discretion of the judges. Lat. 12. Hill. 1 Car. Herbert and Vaughan's Case.

20. The Court did take bail for a prisoner against whom an appeal of murder was brought, because he did not fly for the murder

Appeal lodged against A. convicted sup-

of manslaughter, but not prosecuted, he was bailed before clergy had. 12

supposed, and had been formerly indicted for this murder, and acquitted upon the indictment. (Mich. 22 Car. B. R.) Upon which presumptions they conceived he was not guilty, else they would not have bailed him. L. P. R. 173.

Mod. 109. Hill. 8 W. 3. *Armstrong v. L'Isle*.

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21. A woman who had been twice indicted of *witchcraft* before, and acquitted, being indicted a 3d time, moved to be bailed, insisting that the *prosecution was for malice*, and she was bailed accordingly to appear at the next assizes. Sty. 116. Trin. 24 Car. Camell's Case.

The Court refused to bail one being found guilty of manslaughter, for that they could

22. A. and C. to whom A. was *second in a duel*, were formerly indicted for killing a man, and found guilty of *manslaughter* only by the grand inquest, and being brought to the bar to be arraigned for it, were denied to be bailed. Sty. 371. Pasch. 1653. the Case of Ld. Arundel and Ld. Chandois.

not bail him *still clergy had*, according to Buckler's Case in Style. 12 Mod. 102. Mich. 8 W. 3. the King v. Keat.—S. P. accordingly, unless a *pardon* be ready to be produced *sub pede sigilli*, and then we may, though attainted of murder or treason; and so on a writ of error to reverse an attainer, we may bail him, and bind him to prosecute a writ of error. 12 Mod. 108. Mich. 8 W. 3. *Armstrong v. L'Isle*.

23. Roll Ch. J. said, he doubted whether one indicted of *perjury* may be bailed, though the clerks of the criminal side said he might. Sty. 368. Pasch. 1653. Anon.

But afterwards, in Hill. 1654, the Parliament being dissolved, he

24. One committed by the council of state and the parliament for publishing a *seditious pamphlet* was denied to be bailed. Sty. 397. Mich. 1653. Capt. Streeter's Case.

was bailed. Ibid. 413.

25. One indicted on *suspicion of robbery* was outlawed, and taken on the outlawry, and brought writ of error, and being brought to B. R. by habeas corpus, prayed to be bailed, and took two exceptions to the indictment; 1st, That he was in prison, and knew nothing of the outlawry. 2dly, That the charge is too general, and nobody prosecutes; but per Roll Ch. J. he cannot be bailed. Sty. 418. Trin. 1654. Baxter's Case.

26. One brought out of Wales by hab. corp. moved to be bailed, because they had no *gaol delivery* there; and by Roll Ch. J. he was bailed to the next assizes. Sty. 418. Trin. 1654. Anon.

27. A person accused of *high treason*, and not within the habeas corpus act, is not de jure to be bailed by this court. Raym. 381. Trin. 32 Car. 2. B. R. in a memorandum there cites it as resolved in Ld. Stafford's Case.

28. The defendant being indicted for *murder* at the quarter sessions, and the indictment being removed into B. R. by certiorari, the defendant appeared, and pleaded not guilty, and he moved to be bailed, which the Court granted, being satisfied by several affidavits that there was good reason for it. 2 Jo. 222. Mich. 34 Car. 2. B. R. Farrington's Case.

29. The

29. The Court of B. R. has power to bail in all cases of *treason*. Skin. 163. cites the opinion of the judges in the House of Lords, 1678. in Zachary Crofton's Case. S. P. by Coke Ch. J. Mich. 13 Jac 3. Bult. 113. obiter.

30. B. R. may bail in cases where they cannot try the party bailed, as persons taken here for offences committed in Ireland are bailed here to appear in Ireland, though they cannot be tried here. Skin. 163. pl. 12. Hill. 35 & 36 Car. 2. B. R. in Ld. Danby's Case.

31. So any lord of parliament committed for high treason by a justice of peace, or secretary of state, may be bailed in B. R. though he cannot be tried there. Skin. 163. pl. 12. Hill. 35 & 36 Car. 2. B. R. in Ld. Danby's Case.

32. Per Cur. We are not bound to bail a man committed for suspicion of murder, where it is expressed that a man was killed, though the coroner's inquest find it but manslaughter, but we ought to have the examination before us, and if it appears to be a case of hardship, we may bail. Comb. 298. Mich. 6 W. & M. in B. R. the King v. Pepper. [ 512 ]

33. It is not proper for justices of peace to give copies of examinations about murder, and where it is found homicide by the coroner yet he ought to commit the criminal. Comb. 298. Mich. 6 W. & M. in B. R. in Case of the King v. Pepper.

34. Two were committed by warrant from the secretary of state for high treason, in assisting the escape of Sir James Montgomery, who was committed by the secretary of state for high treason; but because it was not expressed in the commitment what was the species of Sir James Montgomery's treason, and these persons are to be charged with the same species of treason, therefore the Court held that they were bailable. Comb. 343. Mich. 7 W. 3. B. R. the King v. Kendal and Roe. 1 Salk. 347. pl. 1. S. C. the treason of Sir J. M. ought to have been inserted in the warrant with an allegation that Sir J. M. did the fact;

and for want thereof they were bailed.——Skin. 596. pl. 9. S. C. and the whole Court agreed that they should be bailed for the same reason.——5 Mod. 78. &c. S. C. Holt Ch. J. said, he thought it must be considered of, though he doubted very much as to the not specifying the treason, that the particular sort ought to be expressed in the warrant; and they were bailed.——12 Mod. 82. S. C. Eyre and Rookeby held, that the species of Sir J. M.'s treason ought to have been expressed, and that for want thereof they should be bailed; and so they were.

When one is committed by one of the privy council, the cause of the commitment ought to be set down in the return; but contrary where the party is committed by the whole council, there no cause need be alleged; per Cur. Le. 70, 71. Mich. 29 & 30 Eliz. Howell's Case.——S. C. cited by Holt, and says the law was then taken to be so; but now since the habeas corpus act, the cause must be inserted, though the commitment be by the whole council. Comb. 333. Mich. 7 W. 3. B. R. in Case of the King v. Kendal and Roe.

A commitment for treason generally, without expressing the species of treason, is good; for the process is the same in one sort of treason as in another. 10 Mod. 334. Trin. 2 Geo. 1. B. R. in Harvey of Comb's Case.

35. An indictment was found against B. at the sessions at N. for petty treason, and murder of her husband, she was brought to the bar, and moved to be bailed, and it appearing upon affidavits of the fact that the prosecution was malicious, and nothing being done, either upon this indictment or the coroner's inquest, and the 3 Salk. 56. pl. 7. S. C. accordingly.——Comb. 405. Hill. 9 W. 3. B. R. the King

v. Barney, the man being dead above a year, she was bailed. 5 Mod. 323.  
 and Corven her mother, Hill. 8 W. 3. B. R. Barney's Case.  
 the wife was

indicted of petty treason, and the mother of murder; Holt Ch. J. thought the sessions could not indict for petty treason, and there is a note, that a letter was read whereby the prosecutrix demanded several things of them, and said that she would not be quiet till they complied; they were bailed, and a rule of Court made, that the justices take examinations, and send them to the assizes, and bind over witnesses to prefer indictments at the assizes, and the record to be certified thither.

1 Salk. 104.  
 pl. 5. S. C.  
 held accordingly; and  
 per Cur.  
 there is no  
 difference  
 between  
 Peers and  
 Commoners  
 as to bail.

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36. The Ld. Mohun having been bailed by Holt Ch. J. appeared upon the last day of the term; and he being in Court, it was prayed that he stand committed, there being an indictment of murder found against him by the grand jury; this was opposed by his counsel, because he being bailed by the Ch. J. and he having all the informations before him, and the same witnesses being sworn upon the indictment as upon the inquisition before the coroner, there would be the same reason for him to stand upon the first bail, as there was at first to admit him to bail; but it was answered, that there would be a difference between an inquisition found before a coroner, where the depositions are in writing and examinable, and an indictment for murder, found before a grand jury, where the evidence is secret, and they are sworn not to discover it; and there may be more evidence given to a grand jury than was given to the coroner, and more evidence may be also given upon the trial than was given to the grand jury, for the party may conceal part of his evidence to prevent practices; and the Court seemed to incline strongly to commit him upon what had been said, but when it was added that there would be a sessions of Parliament within two or three days, they committed him; and it was said, that if the Lords in Parliament pleased, they might remove the indictment by certiorari, and admit him to bail there. Skin. 683.  
 Mich. 9 W. 3. B. R. the King v. Ld. Mohun.

36. The defendant was indicted for murder, the Court would not bail him, though the evidence upon the reading did not seem sufficient to prove him guilty; for per Holt, allowing bail may discourage the prosecution, and it is not fit the Court should declare their opinion of the evidence before hand. 1 Salk. 104.  
 pl. 7. Trin. 11 W. 3. B. R. Anon.

37. One charged with buggery is not bailable; per Holt Ch. J. 12 Mod. 435. Mich. 12 W. 3. Anon.

38. A man brought to this Court by *hab. corp.* upon a commitment by a justice of the peace, who have cognizance of the cause, is not bailable till the order is quashed, because till then he is in execution. 11 Mod. 45. pl. 6. Pasch. 4 Ann. B. R. Anon.

39. A motion was made for a habeas corpus to bring up the body of the defendant, charged with *picking a pocket*, and offered to bring unexceptionable bail, and to send down a tipstaff to inquire of his reputation; per Holt Ch. J. though we have a discretionary power, yet it being certified (*sworn*) that he was charged with the fact, I think we ought to refuse to bail him; which

which (on consulting his companions) he accordingly did. 11 Mod. 261. pl. 18 Mich. 8 Ann. B. R. the Queen v. Mickal.

41. It was doubted whether persons committed by rule of court are intitled to the benefit of this act; and it was resolved by 2 judges, viz. Eyre and Fortescue, (*absente Powis, & dissentiente Pratt*) that none are intitled to make their prayer but such as are committed by a warrant of a justice of peace, or secretary of state, and not those committed by rule of court; for *that* is not in the meaning of the act of parliament, (*a commitment by warrant.*) 10 Mod. 429. Hill. 5 Geo. 1. B. R. Anon.

### (H. a) By the Habeas Corpus Act.

1. 31 Car. 2. cap. 12. *IF any person shall stand committed or detained for any crime, unless for felony or treason expressed in the warrant, in the vacation-time, it shall be lawful for the person, (other than persons convicted or in execution) or any one on his behalf, to complain to the Ld. Chancellor, or any one of the justices of the one bench or the other, or the Barons of the Exchequer of the degree of the coif; and the Ld. Chancellor, justices or barons, or any of them, upon view of the copies of the warrants of commitment and detainer, or upon oath that such copies were denied, are required upon request made in writing by such person, or any on his behalf, attested by 2 witnesses present at the delivery of the same, to grant a habeas corpus under the seal of such Court, whereof he shall be one of the judges, directed to the officer in whose custody the party shall be, returnable immediately before the Lord Chancellor, or such justice, baron, or any other justice or baron, of the degree of the coif, of the said Courts; and upon service thereof the officer or his deputy shall bring such prisoner before the Lord Chancellor, or such justices, barons, or one of them, before whom the writ is returnable, and, in case of his absence, before any other of them, with the return of such writ, and the causes of commitment and detainer, and thereupon within 2 days the Lord Chancellor, or such justice or baron, shall discharge the prisoner, taking his recognizance, with one or more sureties, in any sum according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his appearance in the Court of B. R. the term following, or at the next assizes, sessions, or gaol delivery for such county or place where the commitment was, or where the offence was committed, or in such other court where offence is cognizable, and shall certify the writ with the return and the recognizance into the Court where the appearance is to be made, unless it shall appear to the said Lord Chancellor, justice or baron, that the party is detained upon a legal process, order or warrant, signed and sealed with the hand and seal of any of the said justices or barons, or some justice of peace, for such matters for which the prisoner is not bailable.*

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S. 4. *If any person shall have wilfully neglected 2 whole terms*  
 O o 2 *after*

after his imprisonment to pray a *habeas corpus*, he shall not have any *habeas corpus* in vacation-time in pursuance of this act.

S. 7. Provided that if any person committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of Oyer and Terminer, or general gaol delivery, to be brought to his trial, and shall not be indicted the next term or sessions after his commitment. The judges of B. R. and justices of Oyer and Terminer and gaol delivery respectively, upon motion made to them in court by the prisoner, or any other for him, the last day of the term or sessions, are required to set at liberty the said prisoner upon bail; unless it appear upon oath that the King's witnesses could not be produced that term or sessions. And if any person so committed, having made his prayer or petition as aforesaid, shall not be indicted and tried the 2d term or sessions after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

2. It was moved that the defendant might be bailed upon the hab. corp. act, for want of prosecution within a term. Per Cur. the grand sessions held at Chester, where the cause arises, is in nature of a term, and if this prayer had been entered there, we might have bailed him (upon motion) the first day of this term; but the prayer being here upon the first day, that can give him no advantage; the discretion of bailing, which the Court had before, is now restrained by that act; and where the act saith (witnesses,) yet if one witness only be sick, it is within the act; and the words of the act being (upon oath made) an affidavit was taken in court viva voce; but this was afterwards waived, and the prisoner was bailed by the consent of the attorney general. Comb. 6. Hill. 1 & 2 Jac. 2. B. R. the King v. Ld. Delamere.

3. C. was brought by hab. corp. the last day of Mich. term, and prayed to be discharged or bailed, having entered his prayer the 1st day of Trin. term last, and was indicted in that term, and now this term was indicted again for the same species of treason, but never tried on either of them. The Attorney General insisted that the first indictment was for a foreign treason, but the 2d was for a treason in England; but by Holt Ch. J. the commitment and both indictments are for the same species of treason, though the overt-acts are differently laid; but the last indictment agrees exactly with the commitment; besides the prayer relates to the commitment; so that the party ought to be tried for the treason for which he is committed, within 2 terms; and the design of the act was to prevent a man's lying under an accusation for treason &c. above 2 terms; to which Eyre J. agreed; but both declared they would give no opinion in the case, but bailed him by virtue of their discretionary power. 12 Mod. 66. Mich. 6 W. & M. in B. R. Crosby's Case.

4. The defendant was committed to Newgate by the privy council, for aiding Col. D. to escape out of the Tower, where he was committed for high treason; and being brought here by hab. corp. was bailed, because though the commitment was for high treason, yet

yet there was no prosecution, and a sessions was past, 1 Salk. 103. pl. 1. Trin. 7 W. 3. B. R. Fitz-Patrick's Case.

5. One committed for treason or felony ought to enter his prayer the 1st week of the term, or day of the sessions next after his commitment, or he shall not have the benefit of the hab. corp. act; but if an act of parliament be made which takes away the power of bailing for a time, he need not then enter his prayer; for that is thereby dispensed with; but then he ought to enter it the first week of the term, or day of the sessions, after the expiration of that act of parliament; and for want thereof the benefit of the hab. corp. act was denied; but because the defendant had been long in prison, and his trial had been delayed, and affidavit was made that his life was in danger, the Court bailed him. 1 Salk. 103, 104. pl. 4. Hill. 8 W. 3. B. R. Ld. Aylesbury's Case.

Comb. 421 S. C. The entering his prayer, when the act is suspended, would be to no purpose; and upon affidavits of his indisposition, the Court said it was reasonable to

bail him upon the power which they have at common law, he having lain so long, his health in danger, and it not appearing when the witness will return, and he was bailed accordingly to appear the 1st day of the next term. — 12 Mod. 117. S. C. and the Court bailed him by virtue of their discretionary power, without any regard to its being in or out of the hab. corp. act; but for the reasons before mentioned, and because Goodman, who was sworn to be a material evidence against him, was here in England several months after his lordship's imprisonment, and that during all that time he was neither indicted nor prosecuted.

6. In an act for suspension of the hab. corp. act of 31 Car. 2. cap. 2. were these words, viz. "That no judge or justices shall bail or try &c. without leave from the King signed by 6 privy counsellors." It was insisted that the hab. corp. act was not suspended, nor is B. R. restrained by these words (*judges or justices*), because the power and jurisdiction cannot be taken away but by plain and positive words expressing the same, nor do they extend to the Ld. Chancellor &c. and that a statute which deprives a man of his liberty, shall not be construed so favourably as other acts of parliament; and the cases of LORD AYLESBURY, FITZPATRICK, and \* SIR WILLIAM WINDHAM were cited, who were bailed during former suspensions of this act. But it was answered, that those words must certainly relate to this Court, because before the act of suspension was made, no judge or justice could bail for high treason, and therefore those words must relate to this Court, which is composed of judges; that the Ld. Aylesbury's Case was not parallel to this, the hab. corp. being suspended only as to him, and them that were then committed on suspicion of treason, or treasonable practices, but not to such as were committed expressly for high treason; that if the judges are restrained the Court must be so too, because it is composed of judges; and that it is to be observed, that this act is penned in the most general words that could be thought on, and that the law-makers could have no other intention than to restrain the judges from bailing either in or out of court, and this seems to be the plain construction of the act, therefore if this Court can neither bail the prisoners or try them, it will be to no purpose to grant our hab. corp. And so it was denied, and the rather because it was denied in LAYER'S CASE; for the Court

\* See the case next following.

would not try him till they had an order from the King, as the act directs. 8 Mod. 98. Mich. 9 Geo. The King v. the Prisoners in the Tower.

7. Sir William Windham was committed to the Tower for high treason by Mr. Secretary Stanhope, and being now brought into court the 3d day before the end of the term, by the deputy lieutenant of the Tower upon an hab. corp. to him directed, it was prayed by Mr. Serjeant Pengelly that the return to this writ might be filed.

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The return was read, and the warrant was as follows, viz.

“ James Stanhope, Esq; one of his Majesty’s  
“ most Hon. Privy Council, and Principal  
“ Secretary of State.

“ These are in his majesty’s name to authorize and require you  
“ to receive into your custody the body of Sir William Wynd-  
“ ham, Bart. herewith sent you for high treason, and you are to  
“ keep him safe and close, until he shall be delivered by due  
“ course of law; and for so doing this shall be your warrant.  
“ Given at Whitehall the 7th of October, 1715.

“ James Stanhope.

“ To the Lieutenant of the Tower of  
“ London, or his Deputy.”

Then Mr. Serj. Pengelly insisted that Sir W. W. ought to be admitted to bail upon this warrant of commitment by Mr. Secretary Stanhope, dated the 7th of October last, and this because of the length of time of his imprisonment, without any prosecution against him; That 8 or 9 months and 4 terms had intervened, and nothing done; that there was another inducement of great weight, in his apprehension, from the frame and form of the warrant, and as to the generality of the commitment, besides the ill state and condition of his health, the danger his life would be exposed to without a prosecution; that he had been there always ready to have answered any prosecution, or any thing that might have been objected against him; that nothing had been done by him to delay and protract the prosecution; that Mr. Attorney General had had 4 full terms; that Sir W. had omitted taking advantage of the hab. corp. act, by not making his prayer the first term after his commitment, which he might have done. Upon these circumstances, where there had been a long default of prosecution, nothing proceeded from Sir W. W. It was the right of every English subject to pray to be admitted to bail; that every person committed for capital offences must be tried in a convenient time, or in default of a prosecution he ought to be discharged upon bail. All commitments before conviction were for safe custody only, and the same rule of justice, the same administration of the law that punished offenders, provided for them a course to ease their imprisonment, and to discharge themselves from the imputation of their offence.

“ That this Court had full power, in these cases, to bail; it had  
been



been exercised in several instances; that he would observe in general how this was at common law. It was the liberty of every person, who was accused, though indicted of treason, or of any felony whatsoever, to be bailed upon good security; so that a man was then bailable for high treason. Co. 2d Inst. 189. Ha. Pl. Cor. 99. 104. An accusation was of no force to deprive a man of his liberty; he was either bailable by the sheriff ex officio, or by the writ de homine replegiando; but though the statute of Westm. 1. cap. 19. which was made 3 Ed. 1. took away this power of the sheriff to bail ex officio, or upon the writ of de homine replegiando; yet it had been always held that the Court of B. R. was excepted out of this act. The same power which it had at common law still remained; This was agreed in both the authorities before mentioned, and it was confirmed by constant experience. Hence it was that this Court was intrusted with the liberty of all persons whatsoever; They were to inquire into the reasons of the confinement of any person.

That after this, in process of time, when commitments grew more frequent and general, the same constant experience held good as to the power of this court. There were then commitments by the council-board, the star-chamber, and other courts, by the immediate warrant and command of the King, and by the lords and others of his majesty's privy council, and this was for some time, and during the reigns of King James I. and King Charles I. it was in some measure submitted to. Then came the statute of 16 Car. 1. an act made to prevent any of these inconveniences: It was thereby (cap. 10.) provided that every person so committed, restrained of his liberty, or suffering imprisonment, upon demand or motion made by his counsel, or other employed by him for that purpose, unto the judges of the Court of B. R. or C. B. in open court, should without delay, upon any pretence whatsoever &c. have forthwith granted unto him a writ of habeas corpus: Then the act directed what was to be done by the sheriff or other officers upon this writ, and upon his making a return, and certifying the true cause of the detainer and imprisonment, the Court, within 3 days after such return made and delivered in open court, were to proceed to examine and determine whether the cause of such commitment appearing upon the said return were just and legal or not, and should thereupon do what to justice should appertain, either by delivering, bailing, or remanding the prisoner: so that upon this act the remedy which the party had, prevented any long delay. The cause of the imprisonment was to be just and legal, and this upon the form of the commitment as well as upon the substance of it; and though the cause were just and legal, yet the Court was obliged either to deliver or bail the party, if the warrant was not formal and good; that by the express words of this act it did not appear that it was in their discretion either to discharge or bail, and this act did not give the Court any new power,

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That before the habeas corpus act there were instances of the Court's inquiring into the nature of the commitment, and letting the party to bail. 2 Sid. 179. SIR ROBERT PYE'S CASE. The case was this; Sir. R. Pye and Ma. Fincher, being committed to the Tower, moved by their counsel for an habeas corpus; and this being granted and returned, it was moved that they might be bailed, they having been a long time imprisoned, without any prosecution made against them. And it was then said by the Court, that though they had been imprisoned for suspicion of treason, they could not deny to them bail, in case the counsel of the Commonwealth, that then was, did not proceed against them: for it was the birth-right of every subject to be tried according to the law of the land, and ought not to perish in prison; whereupon they were bailed. He said that a man ought not to perish under an accusation or commitment. There was also ZACH. CROFTON'S CASE, 1 Keb. 305, 306. 1 Sid. 78. Trin. 14 Car. 2. The books say, that after he had been in the Tower, being committed there for high treason by the lords of the council, March 23, 1660, he was brought into court upon an alias habeas corpus the beginning of that term; and upon the King's serjeant offering to indict him that term, he was removed, and by rule brought up the last day of the term; and then through the delay of the prosecution, and no indictment being against him, he was admitted to bail. That it was said in Keble, that CORNWELLING'S CASE was only by length of time; so in that case it appeared that bailing of the party was the event of it. He said that there were later instances than these, where bail had been the event of a long imprisonment. YATES'S CASE, Hill. 2 W. & M. Show. 190, 191. B. R. Yates was committed to the prison of Hull for high treason, and it was moved that he might enter his prayer here, that he might be tried; but it was denied by the Court, because it must be at the assizes for the place; yet because of the length of time to the assizes, it being not for that county till the summer, to prevent his imprisonment during that time, he was bailed. Persons must be tried in a reasonable time; and Sir Barth. Shower there insisted, that otherwise by a commitment to Dover, Canterbury, or any place where the assizes were but rare, a man might be a prisoner a year or two; so that

[ 518 ] in these extraordinary instances as well as in the nature of the thing, this Court had taken security to the government, and let the prisoner out upon bail; that a man was not to be confined 6 or 8 months by way of punishment, that this here was a much harder case; 8 or 9 months had been endured, and no cause shewn, or a step taken towards a prosecution,

That after this there were other instances, as LORD AYLESBURY'S CASE, Hill. 8 W. 3. that he having neglected to make his prayer in the proper time, and having lain a long time in prison, and the King delaying to try him, the Court thought fit to bail him, That in the Case of THE KING v. GAGE & al,

for the murder of Conway Seymour, *Ld. Ch. J. Holt* said, that there were many cases omitted out of the *habeas act*, and that before this *act* there was a rule at common law, that persons in prison, in convenient time, must be bailed, and that trials for capital offences ought to be recent, and that the Court would consider of the circumstances, if the party were to be admitted to bail. He said, that to be continued in custody a long vacation, when the commitment was so long since, would be very hard : but the Court would regard a proper time for these prosecutions ; that here was not the least preparation or attempt made towards carrying on a prosecution. That though there was no time expressly limited by the statute of *King Cha. I.* for these prosecutions, yet it was apprehended, that now by the *habeas corpus act* of the 31 *Car. 2.* there was a full obligation upon the discretion of the Court to admit prisoners to bail, though upon this *act* there is no limited time for a prosecution. The words are, viz. " If any person shall be committed for high treason or felony &c. upon his prayer or petition in open court, the first week of the term, or the first day of the sessions of *Oyer and Terminer* &c. to be brought to his trial, shall not be indicted some time in the next term or sessions, &c. after his commitment, the judges of *B. R.* justices of *Oyer and Terminer* &c. shall the last day of the term or sessions set at liberty the prisoner upon bail, unless oath be made that the King's witnesses could not be produced the same term or sessions ; and if any such person &c. shall not be indicted and tried the same term or sessions &c. after his commitment &c. he shall be discharged from his imprisonment." He agreed, that this was a proper measure for the Court to go by. What the parliament have thought a reasonable time ought to govern the discretion of the Court. By this *act* the King did declare that to be an obligation upon himself and his courts of justice, and he consented by that law, that if there was no prosecution in that time, the prisoner should be bailed the first term, without an affidavit of the King's witnesses being then out of the way, and discharged the 2d term, if not tried. That though the party did not make his prayer in due time to be within the *act*, yet the rule of justice was the same to all persons.

That in the present case, as there had been no attempt to shew any reason for a delay of the prosecution, notwithstanding the length of time, this neglect had been sufficient to have induced the discretion of the Court to bail *Sir W. W.* yet he said further, that from the form here of this warrant he ought to be admitted to bail first, for that there was a great uncertainty in it ; (a person committed generally for high treason) without the particular species of treason had been expressed, the Court will not continue *Sir W. W.* longer in custody ; by law the warrant ought to express the species of treason. It was not sufficient to commit a man for treason generally, or else at that rate it would be in the power of the person who makes the warrant, whenever he thinks

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a matter is a treason, to commit the party for it. That *Ld. Coke* had laid it down as a rule, 2 *Inst.* 591. that a mittimus must contain the cause, though not so certainly as an indictment ought, yet with such convenient certainty as it might appear judicially to the Court what the offence was, whether for high treason against the person of the King, or for counterfeiting the great seal, or for counterfeiting of the King's money. So it was in the case of petit treason; it was not sufficient to say in a warrant, that it was for petit treason generally, but it must be expressed for the death of such an one his master &c. If it were in the case of a felony, it must not be for felony generally, but it ought to say for the death of such an one, or for burglary, or for robbery, or for the stealing of an horse, or the like, that it might appear judicially to the Court, that it was an offence for which he ought to suffer death; for in a case of so high a nature, concerning the life of man, the convenient certainty ought to be shewn to the Court, and this not only for the sake of the party in prison, but for the benefit of the King, in case there should be a breach of prison, if any one should assist him to make his escape; therefore in the first place, as the species of the treason ought to be set forth, so it must be in cases of felony, or else the felony might be only stealing of charters of land, or wood growing, or the like, which a justice of peace might apprehend to be felony, though in law they were not so. A farther reason *Ld. Coke* gave, was, that if a man were indicted of treason, or indicted or appealed for felony, the capias thereupon which issued to apprehend the party, did comprehend the cause of that indictment &c. a fortiori the mittimus whereby the party was to be arrested, having no ground of record as the capias had, must, pursuing the effect of the capias, comprehend the cause in convenient certainty. With this agreed *Ha. Pl. C.* 109. He said, that upon this point there had been an instance in this Court expressly for this cause, *Mich. 7 W. 3. KENDAL, ROE & al.* of which there was a short report 5 *Mod.* 78. 85. the case was this; They were committed to a messenger by *Sir W. Trumball*, one of the secretaries of state, for aiding and assisting *Sir James Montgomery* to make his escape, he having before been committed for high treason, without mentioning what species of high treason he was charged with, and upon debate they were admitted to bail, because the particular species was not mentioned. It was held not sufficient to commit them for aiding and assisting a person charged with high treason in his escape, without a particular description of the treason in the person committed, and it not appearing to the Court that the cause was sufficiently ascertained, they admitted them to bail. *Sir Barth. Shower*, of counsel with the prisoners, said, That if *Sir James Montgomery* had been committed for such a cause generally, for which the prisoners then stood committed, in aiding and assisting him in the making his escape, he ought to have been bailed, and this was not denied by the Court. The reason given in that book (5 *Mod.*) was, a general rule, that if the warrant had

had expressed the species of treason, they had been guilty of the same particular species; this was not for the sake of the party, but for the better custody of him by the gaoler. But he said, that upon his general return here, as it is, it was entirely in the discretion of the magistrate to make what he will to be high treason; he may not confine himself to the particulars within the statute of 25 Ed. 3. so that for the satisfaction of the Court, the particular species of treason ought to be mentioned, whether it be for compassing the death of the King, the levying war against him &c. or else a man may be continued in custody only upon the apprehension of the magistrate. He said, that this Case of Kendal and Roe was a very strong and positive opinion; that the statute of K. Ch. 1. and experience ever since, had confirmed this opinion, and from the express words of this statute the Court ought to examine, whether the cause of commitment were just and legal, not from the circumstances of the fact only, but from the form and frame of the warrant; that in the statute of Car. 2. the words were ("committed for high treason or felony plainly, and specially expressed in the warrant of commitment") this must go to the specific offence; you cannot say a man is committed for felony, without specifying the act. [ 520 ]

He said, that there was a further instance which would move the discretion of the Court in this matter, and that was Sir W. W.'s ill state of health, and the condition he had been in during his confinement; that a longer confinement without a prosecution would expose his life to great danger; that he would not enter into the expressions of the terms of his indisposition; there were affidavits of that from his physicians; that he had for some years been under this indisposition, an inflammation in his lungs; that his physicians did say it had affected him in such manner already, that a remedy might come too late without the air of the country; that there was also this circumstance in the family, his father died of the same distemper in the lungs about the same age; that the danger might still be increased by 2 or 3 months longer confinement this hot season of the year, and then there would be no need to carry on a prosecution or indictment against him. That Sir W. W. had done every thing that signified his obedience; he would not attempt or do any thing that might give offence; that this was no surprise; on the other side, he had given all opportunities he could to their carrying on a prosecution; and that upon these circumstances he hoped that the Court would exercise their discretion, in granting him an enlargement upon security; that there were present 4 noble persons to be his bail, that he should answer any accusation against him, and for his good behaviour in general, which would be a better security to the government than to keep him in custody.

Then Mr. Jeffrys, of counsel for Sir W. W. prayed the affidavits might be read, which being done, he observed, that from the first affidavit it appeared that Sir W. W. had this inflammation

tion in his lungs from his youth ; that his father died of it about the age he was now of ; that in 1710 he was forced to leave this town, and go into the country ; that in 1714 the cough returned upon him very violently ; that his sickness and indisposition now was to be imputed to his want of air and exercise ; that Dr. Horney, the physician of the Tower, was of opinion, that if his disorder should increase upon him this hot season of the year, it might endanger his life.

Then the affidavits of two of his servants were read, how this indisposition had been during his confinement &c. Upon which Mr. Jeffrys proceeded, and said, that they did not pretend to move for a discharge of the commitment ; that Sir W. W. was very willing to give testimony of his innocence, and therefore now only prayed to be bailed.

Then he took notice of the form of the warrant, viz. " I fend " you herewith the body of Sir William Wyndham for high " treason, to be safely and closely kept, until he shall be delivered " by due course of law &c." and said that the liberty of all the subjects of England were concerned in this matter, and that here was a commitment without oath. That my Ld. Coke, 2 Inst. 51. on his reading upon the statute of magna charta said, that where there was any witness against an offender, he might be taken and imprisoned by lawful warrant, and committed to prison ; that the statute of 25 Ed. 3. cap. 4. took notice and recited the statute of magna charta, and then enacted, That none should be taken by petition or suggestion made to our Lord the King, or to his council, unless it were by indictment or presentment, or by process made by writ original at the common law ; that in this case there did not appear so much as a bare suggestion. Here [ 521 ] was a commitment without any fact made out, without any proof of a crime ; that our liberties from that time forward would be at the disposal of the secretaries of state ; we should be but tenants at will to them. He said, that from the generality of the crime in the warrant it was void, because the crime was not specified ; It did not appear what this offence was ; that it was very well known the species of high treason were very different ; that the judgment was very different. In some cases it was to be drawn, hanged and quartered ; in others, as for counterfeiting the coin, the quartering is no part of the sentence. The species of treason to be expressed in the warrant was not for the benefit of the party only, but was also for the benefit of the crown, that it might be known what sort of crime it was, and what judgment was due ; that it was said 2 Inst. 52. that it was for the King's benefit, and that the prisoner might be the more safely kept.

That if the lieutenant of the Tower should have permitted Sir W. W. to have made his escape, could he be charged with high treason ? What sort of judgment must there be given here ? There was no such thing as a judgment in law generally for treason.

That

That in the Case of KENDAL AND ROE, Mich. 7 W. 3. three things were objected, 1st. Whether the secretary of state had power to commit? but this was over-ruled. 2dly, Whether the commitment could be to a messenger? and this not prevailing, it was 3dly insisted upon, that the species of treason which Sir James Montgomery was committed for ought to have been set forth, and upon this they were admitted to bail.

That there was another matter of weight here as to the manner of the commitment; he was to be safely and closely kept, and the lieutenant of the Tower has done this very fully; that there was a form and proper conclusion to all warrants; that Ld. Coke took notice of this form, and of the conclusion, that if the party behaved himself ill in custody, he might be so closely kept for the safer custody of him; but that the magistrate had only power to commit the party, not to direct any such thing concerning his confinement.

That this case here was the same as LD. AYLESBURY'S CASE; he said, he had some particular reason to know it very well, he was committed 21 May 1695. and he continued in custody till Hill. term following; that this term, when he came to make his prayer according to the habeas corpus act, he was told he was not within it, for that he ought to have made his prayer the first week in the term after he was committed, the act of suspension not reaching this case.

Mr. Reeves argued of the same side, that here was sufficient to make the Court exercise their power of bailing; first, the length of time of the imprisonment, and no prosecution; There was besides this, the state and condition of Sir W. W.'s health; his life would be in danger by a longer continuance in custody; then there was the form and generality of the warrant; that either of these reasons was sufficient, but when all 3 concurred, that Case would be the stronger.

That first, as to the length of time, Sir W. W. was committed the 7th of October last; that between 8 and 9 months had passed, and during that time there had been no prosecution; that though there was no time limited by law for a prosecution, yet it ought to be set on foot in some reasonable time; that here was not any reason given why Sir W. W. had not been prosecuted.

That as to the hab. corp. act, it appeared from it that persons were to be kept in custody but for some convenient time, and he would submit it, whether this act did not say what should be a sufficient time. "It was enacted, that if any person committed &c. should enter his prayer the first week of the term &c. to be brought to trial, and should not be indicted that term &c. he was to be set at liberty upon bail the last day of the term &c." That in this case Sir W. W. had neither entered his prayer the first term after his commitment, or the 2d, or 3d, but at the end of the 4th; That if he had come with his prayer the first term, the courts of justice must have bailed him; and it must be submitted

mitted whether the Court now in their discretion ought not to do it. Then as to his health; as to the circumstances of this case, the nature of Sir W. W.'s indisposition, the great danger he is under, the inflammation in his lungs, it being a distemper his father died of about the same age, and the dangerous symptoms now upon him; these things too must be submitted to the Court; That as to the form and generality of the warrant, the Case of Kendal and Roe was in point, that if the warrant were ill, the party ought to be admitted to bail. There was a commitment generally for high treason, "Receive and take into your custody Kendal and Roe for high treason." And if this were good, could then what came afterwards make that warrant a bad one, by describing the species of treason? If the general part be good, the other could never make it bad. Then it said "For aiding and assisting Sir James Montgomery to make his escape, being in custody for high treason;" now this might be a treason for compassing the King's death, levying of war against him &c. in which case persons aiding and assisting knowingly, would have been guilty of high treason; but if the offence were harbouring a jesuit, counterfeiting of money, coining of money &c. that the aiding and assisting the offender to make his escape would not be high treason; That the Court there did not go into an examination to supply the defect of the warrant, but they took it upon the face of the warrant, and because there was not a sufficient charge of high treason, and purely upon the generality of the warrant, Kendal and Roe were admitted to bail.

Then to apply this, if there were a case of high treason for which he might be committed, the Court will bail him. He might be committed for counterfeiting of the coin; and if so, would not the Court, after 4 terms, bail him? Surely the Court would have done it: That the Court could not take any notice of what he was committed for, but from what was expressed in the warrant; and though the warrant were good, yet upon the uncertainty of it he ought to be bailed; That upon the habeas corpus act it did seem to be the opinion of the Parliament, that the species of treason ought to be expressed. What was else the meaning of the words "plainly and specially expressed in the warrant of commitment?" No one was to have the benefit of this act to be bailed, if in the warrant the treason or felony were plainly or specially mentioned.

That as this case was, he hoped they had a very strong one; that there were 4 noble persons of great fortune who would have the custody of this gentleman, and that he should appear at all times; that this was as safe a custody as that of a single person, the gaoler; that from the circumstances of his health, and the exposition of the warrants, the Court might exercise their discretion of bailing.

Then Sir Joseph Jekyll (the King's Ch. Serjeant at Law) spoke on the behalf of the crown, and said, that there was no

doubt



Doubt but the Court had a power of bailing; they had it at common law, and it was not taken away by any statute; that gives no reason in this case for the length of time, which only holds when there is a failure of prosecution &c. which did always suppose the innocence of the party; the commitment was on the 7th of Oct. last, at which time many persons were involved in the rebellion, and the prosecution of these persons had taken up the time of those who had the honour to serve the crown; so that it was not a neglect, nor to be imputed to those engaged in the prosecution, because he might have accelerated the prosecution, and called upon the crown to have been brought to his trial by the habeas corpus act; so that the reason turns upon them; that the length of time was owing to his neglect, that he did not make his prayer in proper time. [ 523 ]

That as to the habeas corpus act, it was reasonable the Court should copy after it, but when that act came to be considered, it would appear directly otherwise, than as the objection had been made; that act was designed for those that would take the benefit of it, and not to assist those that would not, nor was any reason to be drawn from the statute to induce the bailing, for it took away the benefit from those who did not claim it, and never designed to grant the same advantage to those that did not desire it, as to those that did.

That all the cases which had been cited, except that of Kendall and Roe and Yates, Show. 190, 191. went upon the great length of time only; but whether this and the presumption of the party's innocence were not answered by the publick business, that the King's counsel had been concerned in, he would submit to the Court.

That as to the liberty of the subject, which had been thrown in, that was to be regarded only as a popular way of talking, but they, who had the honour to serve the crown, had more reason to do it, against the rebellion that was raised to destroy the liberties of England, as well as the person of the King.

That these warrants were legal warrants, and this objection was made in CROFTON'S CASE, but not allowed; that the habeas corpus act insisted upon in this matter, saying "the treason or felony must be plainly and specially expressed in the warrant," there (plainly and specially) must be the same thing; it was never the design of the statute to consider the difference of high treason; they were of the same consequence in law; they were all capital offences; it was the same crime in law, and therefore the species need not be expressed. That as to the discretion of the magistrate, it was for him to judge of accusations that come before him; where was the extending and amplifying of his power, if he were left to distinguish between offences? All treasons were in a written law, they were all enumerated in the statute of 25 Ed. 3. or in subsequent statutes, otherwise there would be less power left to the magistrate than there was in a judge upon an accusation before him; that as to the Case of KENDALL AND ROE,

Roe, that was plainly different, for there was a commitment for having aided and assisted Sir J. M. in his escape, being committed for high treason; it ought to have been particular as to the species of treason, because the crime committed by Kendall and Roe was for secondary treason, and this depended solely and intirely upon the first warrant of commitment, and therefore such a particularity might be necessary to bring these persons to be punished for the high treason, and yet not so in the principal case; for if Sir J. M. had been before the Court, that would have been some doubt whether the treason must be specified; but that in the Case of Kendall and Roe for secondary treason, it could be so no further than the treason expressed in the warrant, so that there may be a difference between that and the present case.

[ 524 ] That as to the matter of the state of Sir W. W.'s health, the Court must go according to law and justice; it was a tender and compassionate point to intermeddle with; he said they were on the harsher side on this case, from what it would be in the case of another person; it did not appear to be any chronical distemper; it did not return by fits. That Sir W. W. did not apply upon the habeas corpus act, but thought then the indisposition he lay under not a sufficient ground; that he was not now in worse condition than he had been.

Then Mr. Attorney General said, that as to the objections which had been made concerning the liberty and property of the subject, that they would be at the pleasure of a secretary of state, and as to the warrant of commitment that it was not said that he was charged upon oath; this latter objection had been over-ruled oftentimes, and if there should be a mistake in the warrant, that would not make the liberty of all the subjects of England at the discretion of a secretary of state.

As to the length of time since this commitment, it had been said, that where the statute of habeas corpus was silent, the Court would bail by common law, but length of time was only good reason in discretion: He argued that there was a rebellion in the kingdom at the time of that commitment, and since the rebellion had been quelled, all persons concerned for the crown, and who should have taken care for this prosecution, had been employed. That Sir W. W. might himself, if he had thought fit, have demanded a prosecution; that he knew so much of a prosecution against Sir W. W. that as far as the matter appeared unto him, it must be in Somersetshire, and though one assizes had lapsed, yet what was before said was a sufficient answer to it.

That as to the legality of the warrant not mentioning the species of the treason, this exception was taken in *Z. Crofton's Case* 1 Sid. 78. and not allowed, and the Bill of Rights in *Rush. Collections*, was only that warrants without cause shewn, were illegal. That the officer which commits must judge of the treason, whether it were generally or specially committed, and if it were specified in the warrant that it was for treason in conspiring the

the death of the King, that might be proved by levying of war, and what light could he have more than now? so that such a specifying did not make it more certain, or more for the advantage of the party, and the warrant was not traversable. That as to the time in Crofton's Case, there was a year and a half's confinement; that there had been many instances of such commitments as these, and in the Case of Kendall and Roe, if it had been an illegal commitment, they must have been discharged without bail; that in that case it did appear that Sir J. M. was dead, and that he being not to be convicted, there could be no conviction of those that let him escape, and they were bailed without debate, chiefly for that reason; the warrant indeed was only just touched upon, That most of the things which had been said were insisted upon in Mr. Harvey's Case this term, and disallowed.

That as to the state of Sir W. W.'s health, if he had known any thing of that being insisted upon, he would have sent the physician of the Tower to see him, but as far as it appeared he said Sir W. W. looked well, that the assises were not far off, and then he might apply for a trial, or enter his prayer, and be discharged.

Mr. Solicitor General observed, that in the habeas corpus act there were 3 sections, wherein mention was made of the causes to be contained in warrants of commitment, the first had the words "Felony or Treason plainly expressed in the warrant of commitment;" the 2d had the words "High Treason or Felony plainly and specially expressed in the warrant of commitment;" and the 3d had the words "Petty Treason or Felony plainly and specially expressed in the warrant of commitment;" and by comparing all these 3 together, it appeared that the Parliament did not intend any other, but that it should only appear whether the offence was high treason or felony. Then to consider the case at common law, he said that this act had not altered the law, but the return upon the commitment will have the same construction as at common law. To what purpose should [ 525 ] the species of treason be set forth? There was no necessity to mention the overt act, yet if any thing more than high treason was to be set forth, it must be the overt act; it would be of no use to the prisoner, nor of any use to the Court, that it would appear that the Court had jurisdiction, without assigning the overt act.

That as to the objection about the power of the secretary of state, he said there was no doubt but he had a power to commit; in the Case of Kendall and Roe this objection was scouted at; and my Ld. Ch. J. Holt there said, that it was made more for delight than necessity; that by a resolution in Leonard's Rep. it appeared that the Court took this difference, that where one was committed by one of the privy council, the cause of committing ought to have been set down in the return, but contrary where the party was committed by the whole council, there no cause ought to have been alledged; that this was offered, to shew that

the secretary of state had power to commit, that these words (plainly and specially) were sufficiently answered by a warrant for high treason only, without any particular species of treason; for suppose it had been laid for high treason in compassing the King's death, of which there were divers overt acts, would the prisoner hereby be better informed? In *Z. Crofton's Case* there was another reason given, for it was said that the King need not discover the particulars, for it might be inconvenient to him, and no one could know what the consequence of this might be.

That in the great case of an *habeas corpus* 3 Car. in the Case of *SIR JOHN CORBET, SIR EDWARD HAMPDEN AND AL.*, upon the general return of a commitment per speciale mandatum Domini Regis; it was agreed, that if there had been any particular description of the offence, it had been sufficient. In 27 H. 7. a commitment pro suspitione feloniz was by all sides allowed to be good. So it was in the time of H. 8. pro homicidio facto. So 30 Eliz. *BROWN'S CASE*, pro suspitione prodicionis; that in *Vaug. 142, 143. BUSHELL'S CASE*, this return was taken for granted; that was on a commitment of *Bushell and al.* for having acquitted *PEN AND MEAD* on an indictment for a riot &c. and it is there said by my Ld. Ch. J. Vaughan, that it might have been objected that as the return of an *habeas corpus* for treason or felony had been good, so the return there was sufficient, and he wondered it had not been mentioned, and it was not objected to either at the bar or at the bench; but it was observed that there was a difference between the 2 cases, for upon a general commitment for treason or felony, the prisoner (the cause appearing) might press for his trial, which ought not to have been denied or delayed, and upon his indictment and trial the particular cause of his commitment must appear: As to the Case of *Kendall and Roe* he said, that the judgment of the Court was not upon the species of treason being not set forth; my Ld. Ch. J. Holt gave no opinion as to that matter, but an objection was there made that *Sir J. M.* was not charged to be guilty of high treason, now he must be guilty of this to make the others guilty of high treason in aiding and assisting him to make his escape; he added, that it was not said in that case that a general commitment for high treason was not good.

As to the length of time, he said that it was to be considered upon the *habeas corpus* act, whether it was not a good deal owing to *Sir W.*'s own neglect, by not applying to the Court sooner, when that act had chalked out a method; for upon entering his prayer in proper time, if he had not been indicted that term, upon motion in open Court the last day of that term, he must have been discharged: That these were conditions put upon the party, of which if he would have the benefit, he must follow what was by them prescribed. That there had been attempts upon the government every body knew; it was not necessary to specify that; could it be said the warrant was void for want of this?

- Surely

Surely it was legal and just, and the secretary in doing what he had done, had but done his duty.

On the reply Mr. Serjeant Pengelly said, that the Attorney General had not given any reason for his delay of a prosecution, that it was not insisted upon that they had any witnesses, or that any of these witnesses were out of the way or absent, to obstruct the carrying on a prosecution; that this being so, it was plain from the hab. corp. act, there was no other excuse to be given to the Court, viz. that the witnesses could not be found, or were not in the way, or by reason of some absence; if Mr. Attorney General had been pleased to have given any account of that, it might have given some satisfaction in this case. That upon every commitment for high treason, there must be express evidence of that fact, and this shews that every thing must then be in a readiness to make out the substance of the commitment; it destroyed all presumption of the witnesses being out of the way; they ought to have proceeded freely; that their delay of not suing for an hab. corp. could not be imputed to their prejudice, but it might evidence how much they were pressed at that time, as that Mr. Attorney should happen not to think of this particular case; that Sir W. W. was not to be involved in the case of those that were in the rebellion; whatever they deserved, whether a recent prosecution or not, he was not within the act made for their trial; his was a particular case; his confinement was to be answered for by a default of their prosecution; that he was not to be neglected, because others of an inferior quality were to be tried; that others of a less quality had been proceeded against in the country, and a person of his quality had been neglected, though in town, always ready to be brought to justice, and that though there was no pretence of a prosecution against him, he must now go down into Somersetshire; that it was not said there was ever an intention to prosecute him; that this looked like a wiful looking over his case, and if this prosecution in Somersetshire should not succeed, yet it might be a satisfaction to some people. He said that the liberty of a gentleman of quality ought not to be restrained upon such suggestion, or a report that Mr. Attorney would prosecute; imprisonment was only for safe custody; the clause of the hab. corp. act, if their prayer was not entered in due time, took away only the remedy the party might have against the judge or officer as to any penalty upon that act, but it was never intended to prevent his being bailed; this was the consequence, that the party should not have the benefit of that act, so as to bring an action for the penalty. It was a waiver of the penalty, but still he did not forfeit his liberty; it gave him leave to get his liberty sooner than he else could, nor took away any benefit he had at common law; that Sir W. W. stood clear still to have the advantage of that statute; that Mr. Attorney had no interruption either in Mich. or Hillary Term, especially in this town; there were 2 terms compleat; that the hab. corp. act said, that 2 terms were a reasonable time for a prosecution, but his client had laid

2 terms more ; this was a double time, and a double punishment ; it doubled the inconvenience upon the prosecuted ; for by law the prosecution ought to be fresh. That as to the form of the warrant, he said that they (the King's counsel) had not given any instance where it had been adjudged good. The event of CROFTON'S CASE was against them, when he was brought up upon his hab. corp. he was remanded for 2 or 3 days, and at the end of the term he was let to bail ; the Court thought that a general commitment was not sufficient to continue him in custody. That there was great reason why the species of high treason should be mentioned : Was there any instance of a commitment for felony generally held to be good, and allowed ? If a commitment for murder or felony generally were not good, could there be any difference, why it should not be so too in case of high treason ? for as treason is the genus, so is felony. He said the reason of this was, because the Court of B. R. which was a superior court, might have some controul over the actions of inferior magistrates, and ought to have satisfaction shewn them ; that it was a crime of that nature for which a person ought to be committed, and in order to this, there must be some convenient certainty in their warrants as to the species of treason ; the fact imported it, As if a man were taken in actual rebellion. That particular species arose immediately from that fact ; shall an inferior magistrate be trusted with the examinations of facts, and yet make the Court a general certificate without having the species, though it were not necessary to set forth the overt act ?

As to the Cases in Rushworth, and the several instances insisted upon, as for suspicion of treason, so for suspicion of felony, *pro homicidio*, he said that these were not law, and that there were at that time several commitments made, when the secretaries of state pleaded, without the particular species of the treason ; that the certificate of the judges in Rushworth was made only to excuse themselves ; that they had not set any persons at liberty, but where the cause of the commitment had not been certified or returned to them ; that as to the Case of KENDALL AND ROE, my Ld. Ch. J. Holt said, it was a strong objection, that the particular sort of treason was not mentioned, and this was insisted upon at the bar in Montgomery's Case.

That as to the Case in Vaugh. it was strong for him ; for upon such a general commitment for treason or felony, the prisoner (the cause appearing) might press for his trial, which ought not to be denied or delayed ; which shews that if this commitment be allowed, yet the party ought to be prosecuted immediately ; and this prosecution ought not to be deferred.

That if Mr. Attorney General desired any recognizance or bail to be given, Sir W. should submit to it, and would be forth coming to appear at any time, which would be a far greater security than his commitment.

Mr. Jeffrys by way of reply also said, That Sir W. had been so close kept, that he had not use of pen, ink, or paper for 1 months,

months, so that he could not apply for an enlargement from his imprisonment.

That as to the Case of Kendal and Roe, no answer had been given to it; for though Sir James Montgomery was dead, yet his death could not alter that case: As to the saying by Mr. Solicitor that the objection about the power of a secretary of state to commit was there scouted at by the Court, it was there mentioned by my Ld. Ch. J. Holt; and though their power be now agreed to, yet they were formerly but clerks of the council, and are but of late grown to be great ministers of state. The Attorney General has said, that we should stay till next term; so much he knew of a prosecution; so that as yet he does not know it with any certainty. The habeas corpus act says, that there ought to be oath made that the witnesses cannot be produced. Mr. Attorney did not say that he had directions to prosecute, or that he would prosecute.

Mr. Reeves, by way of reply, further added, That it was not said how long time Mr. Attorney had directions to prosecute in Somersetshire: There had been already an assizes in Somersetshire; there was a considerable time between October and that assizes, and 2 terms had since intervened. Sir W.'s commitment was in this town, and if he had entered his prayer in time, he would have been intitled to be bailed long since: That if Mr. Attorney did intend to try him in Somersetshire, he would have an opportunity to do it after his being bailed as well as now; but as to Sir W.'s own case it was of far greater consequence; for if he were kept in custody, he would be in danger of his life; but the prosecution might nevertheless go on; and as to the Crown, there could be no inconvenience. [ 528 ]

As to the Case of Kendal and Roe, that had not been answered: It was there determined that it was an ill commitment. The judgment of the Court there was, that such a general commitment was a reason for the Court to bail, though not a void commitment; that this was what they now insisted upon. Take it to be a good commitment, the party still ought to be bailed; this did not shew that it was an illegal commitment. As for that which was said further, that Sir James Montgomery was dead, this was not taken notice of by the Court; but judgment was given upon the form of the commitment; that as to the objection, that it ought to have been there averred that Sir James Montgomery committed high treason, this made the present case the stronger.

That as to the reason given for a delay of the prosecution by the rebellion, it did not appear that Sir W. W. was in custody for an act done in the rebellion, or for any other act of high treason whatsoever.

That for the length of time, the generality of the warrant of commitment, though not a void warrant, their being ready to give bail to appear in Somersetshire, after so long being in custody,

today, he hoped the discretion of the Court would be induced to bail him.

Then Sir W. W. himself spoke ; That for 2 months after his having been committed, he was so closely confined that he could not enter his prayer, if he had known it was necessary ; that nobody was allowed to come to him till the habeas corpus act was suspended, not even his wife ; and afterwards only the duke of Somerset and his lady, and his own wife ; That there had been 16 or 17 in the Tower, and all the warrants of commitment contained the particular species of treason except 2 or 3 ; That he had lately had an opportunity to look upon the habeas corpus act, and there was a clause in it, that no person which should be set at liberty upon an habeas corpus &c. should be again committed or imprisoned for the same offence. Then how could that be made appear, but only by the species of offence expressed in the first warrant ? That his commitment was before any of the rest that were in the Tower.

That as to the prosecution in Somersetshire, there had been 3 quarter-sessions and one assises already passed ; that if Mr. Attorney would say upon his honour, that he had evidence upon oath to find a bill against him, he would be content to lie by the next vacation.

The Ch. J. then said, that the Cases which had been mentioned were soon found out ; and that his brother Pengelly had had, he did believe, a very full account of them ; That as to what Sir W. W. had mentioned concerning his confinement, it would be proper that affidavits should be filed of it that night, that they might have time and opportunity to lay before the Court the matter of facts as well as the matter of law ; and the last day of the term let Sir W. W. be brought here again.

Then a request being made to the Court, that counsel and a solicitor might have leave to have access to Sir W. W. the Ch. J. said, that as to the counsel and solicitor's going to him, that would be proper to be mentioned to the secretaries of state.

[ 529. ] Major Doyley, the Lieutenant of the Tower, being asked concerning the nature of the confinement, said that nobody had been let in to Sir W. W. but by particular warrants ; no person what-soever, or any letter, was to be admitted to go to or from him. Upon which the Ch. J. asked the Lieut. about Sir W.'s being able to send any message, what he could do as to that ; and the Lieut. answered, Nobody but (such an one), and that not without communicating the message to one of the secretaries of state. Then the Ch. J. said to the Lieut. Let us have these warrants brought up with you. If any answer be put in as to the nature and circumstances of Sir W.'s health, let these affidavits be filed by to-morrow night. Let us look upon these Cases that have been mentioned, when they were, and how they are, viz. YATES'S CASE, LD. MONTGOMERY'S CASE, ZACH. CROFTON'S CASE, and the CASE OF KENDALL AND ROE.



Then a rule was made for the Lieutenant of the Tower to bring up Sir W. W. again the last day of the term ; which being done, the Ch. J. delivered the opinion of the Court, viz.

That Sir W. W. being brought up there from the Tower by a habeas corpus, the return to it was, That he was charged there by a warrant under the hand and seal of Mr. Secretary Stanhope (in the words as above).

That it was directed to the Governor of the Tower of London, or his Lieutenant.

That it had been prayed that Sir W. W. might be let out upon bail ; and to induce the Court to do this, several reasons had been offered to the Court ; That it had been admitted on all sides, that the Court had power to bail upon a commitment for high treason, though there were a good and proper commitment ; yet as for the circumstances of the case, that the first thing insisted upon or objected, was from the form of the warrant ; and there the first objection was, that he was to be kept in safe and close custody ; that this was more than by law could be justified ; it was only a safe custody for the party, so to be taken care of, that he might not make his escape. He said this was advanced without any authority, or one single instance, and against 40 precedents ; that there had been many occasions when this exception might have been taken ; That in Kendal and Roe's Case some notice was taken of this exception ; but it was there allowed as proper to be done. What had been the consequence, if the imprisonment had been more close than by law it ought to have been ? That is not the consequence that the Court should discharge the prisoner.

That the next objection that was made was, That this warrant was not said to be made upon oath, and this was pressed in a pretty strong manner, that if people might be committed in this manner it was making them for their liberties tenants at will to the secretaries of state. But, in the first place, he said it was a hard way of arguing, that because no oath was expressed in the warrant, therefore he was committed without oath ; and if the oath were not expressed in the warrant, it was not necessary. This was also pressed, without one single authority ; that many commitments had been in that form ; many had been brought before the Court in that form. In some of them mention had been made of this thing, but it was never taken to be of any weight ; but on the contrary Trin. 2 W. & M. this matter was particularly insisted upon, that a warrant of commitment without oath was illegal, and it was over-ruled. This was FERGUSON'S CASE. In the Case of Kendal v. Roe, it was insisted upon, and not allowed ; That there might be an imprisonment in many cases without an oath ; That this matter was lately under consideration in the House of Lords, and the judges were asked their opinions upon it, which were delivered by my Ld. Ch. J. King, That warrants of commitment were good without being upon oath ; That in many instances warrants without an oath could not be illegal. There might be many instances where an oath was not

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necessary; A person may be found with treasonable papers about him, or may be taken in the fact. The magistrate that commits, must see that the party is guilty. Where a magistrate executed a matter within his jurisdiction, it should never be presumed that he abused that jurisdiction.

As for the next objection that was made, that the warrant was too general, not saying for what species of high treason the commitment was; he said, that this was likewise advanced without any authority; none of the books cited did prove it; *Ld. Coke*, though he said the warrant must contain the cause of commitment, did not say that the magistrate must go into a specification of the offence; the first reason given for this was grounded upon *2 Co. Inst. 591.* that the warrant must contain the cause, that it might appear to the Court judicially, that the offence was for high treason, either against the person of the King, or for what else; but he said, he would not go over the reasons mentioned in that book, for that they could not be supported in all parts. But the Court did in all cases rely upon the judgment of the magistrate; that it had been admitted that it was not necessary to set forth the overt act, and if it be not necessary to set forth the overt act, it must be left to his discretion, whether the offence were high treason or not; the Court could never from thence form any judgment, whether it were high treason or not. In the same book it was allowed, that a commitment *pro alta prodicione contra personam Domini Regis* would be sufficient, but what judgment could the Court form of that? One species was for compassing the King's death, and another was for levying of war &c. each was high treason against the King's person; could the Court form any better judgment upon the one than he could upon the other? So again for levying of war, there were many species of levying of war, and there were some riots which were very near treason. Then this objection was urged further, that this certainty was required, because it might be extended to others who might be assisting to a person so committed in making his escape. But he said, that this only shewed that the party was not so strictly guarded as he ought to have been; but was the party therefore to be permitted to go at large? The next objection was made by *Sir W. W.* himself, and very plausibly, that the habeas corpus act did suppose the offence should be specified in the commitment (because there was a clause in it, that no person which had been delivered, or set at large upon an habeas corpus, should at any time thereafter be again imprisoned or committed for the same offence), or else it could not appear upon the 2d commitment that it was for the same offence as the first was for; as to this he said it was true, the offence could not appear to be the same in both commitments, without being specified, but this must arise upon circumstances, and for proof the evidence of the identity of the fact did not turn upon the warrants, but upon the examination of the facts upon which the warrants were grounded. If the first were for high treason in killing the King, the next might be for com-

compassing the death of the King. Here this must not turn upon the expressions of the warrant, the act is penal against him that made the commitments, and it will lie upon him to make out that there was a 2d fact; so it would be if the expression in the warrant should be different, as in the first for levying war against the King, this was one species of high treason; if the 2d, for compassing the King's death, that was another species of high treason; yet if the fact was the same, the party must be delivered upon this act; he would be intitled to bring his action for the penalty against the officer, and it puts the proof upon the officer, that the 2d commitment was not for the same offence with the 1st; so that this exposition of the act, by specifying the particular treason, will not answer the end of it, for if the species were not the same in both commitments, the facts might be the same, or if the species were the same, the facts might be different. [ 531 ]

There was a further objection, and that was the Case of KENDAL AND ROE; he said, that Case was thus: They were committed for high treason, for assisting in the escape of Sir J. Montgomery who had been committed for high treason, and their warrant of commitment ran thus, viz. "Sir W. Trumbal, Knt. one of his Majesty's most honourable privy council, principal secretary of state.

"These are in his Majesty's name to authorize and require you to receive into your custody the bodies of Thomas Kendal, and Richard Roe, herewith sent you, they being charged with high treason, in having been privy to and assisting the escape of Sir James Montgomery out of the custody of William Sutton, one of his Majesty's messengers in ordinary, and charged with high treason, you are to keep them in safe and close custody until they shall be delivered by due course of law, and for so doing this shall be your sufficient warrant. Given at the court of Whitehall, the 24th day of October, 1695.

"To the Keeper of Newgate, William Trumbal.  
"or his Deputy."

He said there was an imperfect report of that Case in 5 Mod. 78. and in this Court there were several exceptions taken to that warrant of commitment, but they were all over-ruled; the exception there taken that the secretary of state could not commit was scouted at by the Court, as Mr. Solicitor General has observed; another objection was, that the commitment by Sir W. T. ought to have specified what the treason was, for it was insisted upon that there might be a sort of high treason, the assisting of which would not be treason, as the aiding, receiving, abetting, and comforting a counterfeiter of the great seal, Co. 12. 81, 82, or of a counterfeiter of money. It was also insinuated that Sir James Montgomery being dead, they could not be tried, and therefore they ought to be admitted to bail. He said this case did not at all turn upon the species of treason, but upon this, that their fact and their crime were specified as not dependant upon Sir James Montgomery's crime, but upon the words of his warrant

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warrant of commitment. It was, that he was committed for high treason, but not charged with high treason. If they aided and assisted him in his escape, their crime must be dependant upon his; therefore he must be committed for a particular species of treason to make them liable to the same punishment he was so committed for. He said that this matter turned upon 2 things; first, that Sir James Montgomery was guilty. 2dly, that he was committed for that particular offence. It was then objected very ingeniously by Mr. Reeves, that if a commitment generally for high treason were good, what came afterwards in it could not make it bad. He said the answer to this was, that he that was committed for high treason might not be committed for the same treason of which he was guilty, so that what came afterwards might make it ill. He was not committed for high treason generally, but for a particular treason, so that he may not be guilty of that treason: as it was in case of a felony for stealing frith or apples growing, so that when you came to specify the particular fact, the general words may lose their force. So it was in case of calling one (thief), if the words went on (for stealing apples growing), these words were not actionable, though (thief) in general was actionable. He concluded that these were the objections which had been made; these were the reasons which had been offered in this case; but then, on the contrary, it appeared from 2 Inst. 52. that this warrant was good. It says the cause must be contained in the warrant, as for treason, felony, &c. or for suspicion of treason or felony, &c. So was 1 And. 298. Ruth. Coll. 1 Vol. Pa. 507. 509. 538. That case was very full to the purpose, and upon a very particular occasion; for it was, as it was said by my Ld. Ch. J. Coke, then the solicitor general, to be a direction for all council-commitments. The occasion was, that several persons had been committed at several times to several prisons without good cause, part of whom being brought up into the King's Bench, were according to law set at large and discharged of their imprisonment, at which several great men were offended, and procured a command to the judges that they should not do so afterwards; notwithstanding which the judges did not surcease, but by advice amongst themselves made certain articles, and delivered them to the Ld. Chancellor, and Ld. Treasurer. The words were these, viz. And where it pleased their Lordships to will divers of us to set down in what cases a person sent to custody by her Majesty, her council, some one or two of them, are to be detained in prison, and delivered by her Majesty's courts or judges; we think that if any person be committed by her Majesty's commandment from her person, or by order from the council-board, or if any one or two of her council commit, and for high treason, such persons so in the case before committed may not be delivered by any of her courts without due trial by the law, and judgment of acquittal had, nevertheless the judges may award the Queen's writs to bring the bodies of such persons before them; and if upon return there-  
of

of the causes of their commitment be certified to the judges, as it ought to be, then the judges in the cases before ought not to deliver him, but to remand the prisoner to the place from whence he came, which cannot conveniently be done, unless notice of the cause in generality or else specially (or as the words are in *Rushworth*, in general or else in special) be given to the keeper or gaoler that shall have the custody of such prisoner; this was signed by all the judges and barons, &c. and they delivered one to the Lord Chancellor, and another to the Lord Treasurer.

Mr. Selden in *Rushworth* insists upon this as the opinion of all the Judges, and produced the report under *Ld. Anderson's* own hand, and this was afterwards ordered to be entered in the council books, so that this was not an excuse only made by the judges, as was objected by his brother *Pengelly*, but a direct opinion of theirs; it was their desire to remedy the inconvenience that then was; it was an application of the judges themselves to prevent the hardships that were exercised then upon the subjects. It was there put, that if the cause of commitment was certified the prisoner must be remanded; so that if the cause appear either in general or in special in the warrant of commitment, according to this resolution it will be well; and *Keeling* (who was a great man) in *ZACH. CROFTON'S CASE*, affirmed, that if the cause of commitment were for high treason generally, it was a good warrant. He said, that the House of Commons, immediately after the debates in *Rushworth*, came to a resolution, that no freeman ought to be detained or kept in prison, or otherwise restrained by the command of the King, or the privy council, or any other, unless some cause of the commitment, detainer, or restraint were expressed, for which by law he ought to be committed, detained or restrained; so that a commitment for high treason generally is good; so was *Vaugh. 142. Ld. Ch. J. Vaughan* there allowed it for law, by not denying the objection there raised from such warrants, but by distinguishing upon it, and *BUSHEL'S CASE* was final and conclusive. These were the great opinions in the time of *Q. Eliz.* and in *3 Car. 1.* when this very matter was under consideration; they were the opinions in *Ld. Ch. J. Vaughan's* time, and have been the constant practice ever since. So he concluded, that these objections which had been made, were not of any weight as to the warrant of commitment. As for the other points, upon the length of time since the commitment, and the indisposition of *Sir W. W.* he said, that as to the former, the cases that had been cited did not come up to this case, and it would not be necessary to go through them all; but yet, though this were here a good warrant, the Court were of an opinion, that *Sir W. W.* ought to be bailed.

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As to the affidavits concerning the indisposition, he said, they were nonsense, and that the indisposition must be a present indisposition, not in purpose or expectation, but the length of time was to be considered; the commitment was about the middle of Oct. last;

last; there had been something said of a crime elsewhere, but nothing of that was laid before the Court. Here was no oath or charge of any crime, nor was it said directly that there would be certainly a prosecution elsewhere. If the act did arise in Middlesex, there had been 4 terms past, and if it arose in the country, there had been 3 quarter sessions, which though not considerable in this case, yet there had been an assizes, and yet no prosecution forwarded. There had not been any preparation towards it, nor yet was it laid certainly that there could be one.

He said, there was a thing that might have been a great objection against Sir W. W.'s then being bailed; that he should lie ~~in~~ so long, and not make any application. But the reason given for this was of some weight in determining the discretion of the Court. It was that the habeas corpus act was suspended at that time, though not as to this particular case. The gentleman might include himself, and be mistaken in it. However, under these circumstances he said it seemed very reasonable that Sir W. W. should be bailed, and to appear here again the first day of next term.

That had Sir W. W. made his prayer the first day of this term, and it had appeared that the matter did arise in another county, the Court could not have bailed him by the habeas corpus act, but they were not then upon that act, but at common law; he said that they were intrusted with the liberties of the subjects of England, and as they were bound on the one hand to take care of them, so they there were on the other hand to take care of the government, that a person might not escape justice, where there was a due prosecution against him; that he would have taken Mr. Attorney General's word, if he had said at the bar that he would certainly have indicted Sir W. W. but there not being any thing of that in this case, they were all of an opinion to bail him.

He concluded that there had been a great many objections made by the counsel; but to start objections against that which had been newly heard and determined by the Court, that they might throw a greater hardship upon the course of the Court, and make it look more odious in the world, where they over-ruled a great many objections (though these great many were made up but of few), was not fair, nor a practice to be suffered, but he hoped it would not be done any more.

Then the Attorney General said, that he had notice of Sir W. W.'s bail, and did not object against them; and thereupon Sir W. W. entered into a recognizance of 10,000 l. and the Duke of Somerset, the Lord Rochester, the Lord Tumont, and the Lord Gower as his bail, into a recognizance of 5000 l. to appear here again the first day of the next term.

Mich. 3 Geo. Sir W. W. appeared the first day of this term, and was continued according to the course of this Court to the last day thereof; when he appearing again, the Attorney General

said,

said, that he had his Majesty's commands for prosecuting him, for misprision of treason, and would proceed against him accordingly, and to answer the delay of such a proceeding an affidavit was read, that a material witness for the crown was then in Holland, &c. upon which the Court declared, that the Attorney General's saying he would prosecute, &c. was a good ground for them to continue Sir W. W. upon bail till the next term.

Hill. 3 Geo. The first day of this term Sir W. W. again appeared, and was continued till the last day thereof, upon which day he was discharged; the Attorney General declaring, that he had his Majesty's order for prosecuting Sir W. W. for a misprision of treason, in concealing the high treason for which my Lord Lansdown was indicted; but the King having been pleased to pardon my Lord Lansdown, and to order him to surcease the proceedings upon the said indictment, he now consented that Sir W. W. might be discharged. Trin. 2 Geo. 1. B. R. the King v. Sir William Windham.

8. These Lords have been committed to the Tower by my Lord Townsend one of the secretaries of state, for treasonable practices against the government upon the late suspension of the hab. corp. act, which being expired upon the 24th day of May last, they applied upon the 26th day of May to Mr. Baron Price at his chambers for an hab. corp. according to the 31 Car. 2. c. 2. which being granted, and they (being brought up to him from the Tower) did insist upon their privilege as peers to be discharged, a peer not being required to give bail for a misdemeanour; but the judge being of an opinion that they ought to give him bail, else he could not discharge them, &c. they waived their claim of privilege, and entered into recognizance (with bail) to appear at B. R. the first day of this term, which was upon the first of June; and they appearing accordingly, it was moved by their counsel that they might be discharged, and not continued upon their recognizance till the last day of the term; and my LORD MARLBOROUGH'S CASE in the House of Lords was quoted, but it was refused by the Court; and Parker Ch. J. said, that the Court could not take notice of what they were committed for, that they had nothing before them but the recognizance, and they could not take notice of the warrant of commitment, or for what they stood committed, and that the Lords must be continued upon their recognizance till the last day of the term, according to the course of the Court, the whole term being in law accounted for as one day. The same day (these Lords going immediately into the House of Peers) debate arose upon this matter, and the opinion of the judges then present being (as it was delivered by the Ch. J. King) that Baron Price and the Court had done their duty, &c. that the judge was obliged to take bail upon the hab. corp. act, and ought not to have discharged the said peers; but this debate being adjourned to inspect their Journals for precedents, &c. upon the 4th of June,

The King  
against Ld.  
Scarfdale  
and Ld. Du-  
plin. Trin.  
2 Geo. 1.  
B. R.

the Court of B. R. was again moved to discharge this recognizance, to which Mr. Attorney General consented, saying he had received his Majesty's command to consent to the discharge of the said recognizance, &c.

Trin. 2.  
Geo. B. R.  
The King  
v. Harvey.

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9. Mr. Harvey having been committed for high treason by my Lord Townsend's warrant (one of the secretaries of state) to the prison of Newgate; was about the beginning of this term brought up upon an habeas corpus, and Mr. Serjeant Darnel and Mr. Hungerford, being of counsel for him, moved that he might be discharged upon bail, and they alleged the ill state of health he was in, of which they produced affidavits; and further insisted upon the insufficiency of the warrant of commitment, as 1st, that he was not charged with any offence. 2dly, that this charge against him must be upon oath, the warrant being only "Receive into your custody Edward Harvey, herewith sent you for high treason." And 3dly, that the species of treason ought to have been mentioned; that Mr. Harvey was on the 21st of Sep. last committed for treasonable practices against the government to the custody of a messenger, and about the beginning of May he was sent to Newgate on this warrant; that he was a member of parliament, and his attendance there was very necessary.

Upon this one Claxton, an apothecary, was examined upon oath by the Ch. Justice, concerning the nature and danger of Mr. Harvey's indisposition.

To this it was answered by Mr. Attorney General and Mr. Solicitor General, That the habeas corpus act was generally "for high treason or felony," the words were "plainly and specially expressed," not specifically; that the bailing was a matter in the discretion of the Court, and Mr. Harvey was not intitled to that favour till the last day of the term; that an offence was sufficiently charged in the warrant "Sent thither for high treason," is charging a man with high treason; that in the late Duke of Ormond's Case, the act for his attainder was generally for high treason; and in case of commitment for murder the warrant need not mention the particular person killed, nay it was not necessary in an indictment. It was replied by Mr. Harvey's counsel, that the species of treason ought to be expressed in the warrant. The habeas corpus act was, that the prisoner should be bailed, except where the charge against him was plainly and specially expressed, and cited CROFTON'S CASE, 1 Sid. 78. And as for the late Duke of Ormond's Case, the act for his attainder refers to the articles of impeachment.

Then it was said by my Ld. Ch. J. Parker, that this was an illness which had been a good while upon Mr. Harvey, and it was proper they should be satisfied about it, there seeming not to be any immediate haste or danger; that they could not take notice of the matter about the warrants, unless it had been more particularly expressed, and perhaps the first commitment was of more service to Mr. Harvey than his liberty could have been, considering



considering his examination before the secretary of state ; for then there might have been some reason for his being detained in custody ; that in my *L.D. MONTGOMERY'S CASE* his sickness was occasioned by his confinement ; but here he knew not how Mr. Harvey had been kept in Newgate, or was kept before going thither. He said he knew him very well, and that he seemed not to be in that state of health he formerly enjoyed. Pratt J. said that he did not think that an indisposition was, in all cases, a reason for the Court to bail. And then the Ch. J. added, that a magistrate might be mistaken in his opinion about the offence, but yet he was not bound to set out all the evidence. It could not signify any thing to the party, whether one species of treason or another was expressed in the warrant ; but if there was a fault in the commitment, the Court could not therefore admit him to bail. In cases of felonies it was every day practised, that if, upon examination of the fact, it did appear that the party ought not to be bailed, the Court did order the justice of peace, who made the first warrant insufficiently, to make a new one to supply the defect of the former.

Then Mr. Harvey's counsel prayed, that his prayer might be entered pursuant to the habeas corpus act, which was done accordingly.

About 2 or 3 days afterwards Mr. Harvey was brought up again by rule, and the Court were of an opinion against bailing him ; but ordered him to be brought up again the last day of the term. Several affidavits were read, and particularly one of the messenger's, describing the nature of Mr. Harvey's disorder, and the circumstances how he came to be under it ; the judges delivered their opinions *seriatim*, and the substance of what they delivered is as follows. [ 536 ]

That it appeared from the affidavits, that this indisposition came upon Mr. Harvey by his own hand ; for when he was first in custody of the messenger he seemed to be very easy and well, but after he had been examined by the council, he was very much dejected, and did not speak for 6 hours, and the next morning he stabbed himself in the breast ; being under these circumstances he was confined in the messenger's hands, and not sent to prison till lately ; so that in the first place, this indisposition was not such as to induce the Court to bail him, because it was occasioned by his own act after he was in custody, and he was then much better than he had been, neither was the indisposition such as manifestly endangered his life, as it might be in the case of an acute distemper : The affidavits were only that his being confined for a few days would make his case the more doubtful, there being then some ill symptoms upon him.

2dly, That the behaviour of this gentleman after his examination, the changing of his countenance, and stabbing himself in the manner aforesaid, carried a strong suspicion of guilt, though it was not sufficient to charge him with any crime.

3dly,

3dly, That the delay of a prosecution, as attended with these circumstances; was not such as to incline the discretion of the Court to bail him. CROFTON'S CASE, LD. MONTGOMERY'S CASE, and LD. AYLESBURY'S CASE, were much stronger in this point. Besides; this gentleman was not before in a condition to be tried, and since he was moving towards his being discharged, the Attorney General ought to have some time to prepare a charge against him if he should think fit.

4thly, That there was a grand jury then sitting; that there had been a rebellion in the nation, and there was a great deal of the same spirit left; that in such a time of danger to the government, the Court ought to be very careful how they discharged a person committed for high treason.

5thly, That there had been no precedent of this kind produced, and if the Court should bail this gentleman, every one who should be committed for high treason, and should be indisposed by his own act, would have a right to be bailed. Their compassion ought to be consistent with justice and the rules of the Court. That if this indisposition had been by the visitation of God, or had been occasioned by his confinement, it might have been of another consideration; but here he was remanded, and ordered by rule to be brought up again on the last day of the term, when he was bailed, but to appear there again the first day of the next term, when he entered into a recognizance of 10,000 l. and his bail into one of 5000 l. each.

For more of Bail in General, See Error, Execution, Habeas Corpus, Replegiando, In Custodia, Mainprize, Replevin, Superseas, Writings, and other proper Titles.

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Fitzh. Labourers, pl. 64. cites S. C. & S. P. by Thirne. and thereupon issue was joined whether he was retained or not.

(A) Bailiff. What Person may be.

[1. A Clerk may be bailiff of a manor. 4 H. 4. 2. b.

2. A. made a lease for years of a house, and then conveyed it to

to J. S. and dies. J. S. being beyond sea, the conveyance was burnt in the Fire of London, and thereupon the heir of A. enters, and receives the rents; but the deed of settlement being found by verdict, the heir during the lease was only as a bailiff and receiver, and decreed to account. Fin. R. 285. Hill. 29 Car. 2. Lister v. Lister.

## (B) The making of a Bailiff.

[1. IF a man takes cattle, claiming property to himself as an heir, if the lord agrees to the taking for services to him due, yet he cannot be said to be his bailiff for this time. 7 H. 4. 34. b.]

Fitzh. Bail. lie, pl. 7. cites S. C. & S. P. by Gascoigne. — Br. Bail. lie, pl. 4. cites 7 H. 4. 30. [and so are all the editions of Brooke, but seem misprinted for 34. b. pl. 1 Hill. 7 H. 4.] cites S. P. by Gascoigne. — Br. Trespass, pl. 86. cites 7 H. 4. 34. S. C. & S. P. by Gascoigne. — Br. Distress, pl. 83. cites 7 H. 4. S. P. — S. C. cited and agreed by Periam, Rhodes, and Windham. 2 Le. 216. pl. 274. Pasch. 29 Eliz. in C. B. in the Case of Fuller v. Trimwell.

[2. But if he took them without any command, for services due to the lord, if the lord after agree to the taking, he shall be adjudged as a bailiff, although he was not his bailiff in any place before. 7 H. 4. 35.]

Fitzh. Bail. lie, pl. 7. cites S. C. & S. P. by Gascoigne. — Br. Bail. lie, pl. 4. cites 7 H. 4. 30. [but see pl. 1. supra] S. P. by Gascoigne; but Brooke says tamen quære inde. — Br. Distress, pl. 83. cites 7 H. 4. S. P. — Br. Trespass, pl. 86. cites 7 H. 4. 34. S. C. & S. P. by Gascoigne, upon evidence given to the jury on a trial. But Brooke says quære inde; for he was once a trespassor without authority, and so the agreement after cannot aid him, because the action was vested before.

3. In trespass quare clausum fregit, the defendant justified as bailiff of the King, but shewed no specialty. The Court agreed, that one may be made bailiff to the King by nude matter of fact, as well as to a common person; but they seemed to think this making traversable. Kelw. 174. b. pl. 2. Mich. 7 H. 8. Anon.

4. A man may make consueance as bailiff to the King, or to a corporation, notwithstanding that he was not bailiff; and so he may as bailiff to another man, if he agrees; for it is not traversable whether he was bailiff or not, if the party agrees after; But Brooke says quære, if he neither agrees nor disagrees. Br. Baillie &c. pl. 1. cites 26 H. 8. 8.

5. A corporation aggregate may appoint a bailiff to distrain, without deed or warrant, as well as a cook or butler; for it neither vests or divests any sort of interest in or out of the corporation. 1 Salk. 191. pl. 3. cites it as so held in Cam. Scac. between Cary and Matthews.

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But if such corporation has no bras, it must be under the seal of the corporation.  
2 Lutw.

149. Hill. 12 W. 3. C. B. in Case of Randle v. Dean, and cites 16 H. 7. 2. b.

## (C) What Things a Bailiff may do.

Br. Baillie, [1. A Bailiff of a manor may *lease the piscary* for years. 3 H. pl. 6. cites S. C. and 4. 12. b.]

it was objected that he did not shew that he had power to lease, by which, &c. but he dared not demur, but pleaded that he fished after the term, &c.

Br. Cuf- [2. A bailiff by any usage cannot make a *lease* of his master's toms, pl. 33. land of an estate of *freehold*. 14 Aff. 9.]

cites S. C. and says this was laid down for Law per Cur. — Br. Leafes, pl. 25. cites S. C. and that the receipt of the rent by the predecessor prior will not aid against the successor.

Cro. J. 377. [3. A bailiff may *give licence* to another to go over the land; pl. 4. S. C. for this is a trespass to the possession only, and the bailiff hath the The licence disposal of the profits of the possession, ergo, dubitatur M. 13 was to go over the land with Jac. B. R. between *Winkfield and Bell*.]

His cattle, which being distrained for damage feasant, and thereupon a replevin brought, judgment was given per tot. Cur. for the plaintiff; for having pleaded the licence of the bailiff, it shall be intended a licence with recompence; especially when it is found by verdict that he gave him licence, it shall be intended to be made in due manner. — Roll. Rep. 258. pl. 27. S. C. and the opinion of Coke Ch. J. was accordingly; but Doderidge inclined that the licence was not good.

[4. A bailiff of a manor may himself take, or may command another to *take cattle damage feasant* upon the land; for he hath the care of all things within the manor. M. 5 Jac. B. between *Tomlinson and Benson*, per Curiam.]

5. Lord and tenant. The tenant makes a *feoffment in fee*, the bailiff of the lord accepts the services of the feoffee, before notice of the feoffment given to the lord; this shall not bind the lord. Quod nota. Br. Acceptance, pl. 21. cites 41 E. 3. 23.

Br. Baillie, 6. A bailiff cannot *exchange the lord's land*; per Yelverton, pl. 3. cites S. C. but to which Fenner agreed. Cro. J. 178. pl. 16. cites 41 E. 3. 26. that is, that the bailiff cannot change the lord's avowry or tenant, but Brooke says quere; for non adjudicatur.

Bailiff of a 7. In trespass it is a good plea, that the bailiff of the plaintiff lord may *leased the land*; for he has thereof authority, and is accountable. land at will, Br. Trespass, pl. 295. cites 2 E. 4. 4.

and good; so he is accountable, and debt lies thereof by the lord; per Choke. Br. Baillie, pl. 31. cites 2 E. 4. 4. — Br. Leafes, pl. 34. cites S. C. & S. P. accordingly by Choke and Moyle.

Bailiff of a manor cannot make a lease, unless by special command of his lord; quod fuit concessum. Br. Baillie, pl. 40. cites 8 E. 4. 13. — Br. Leafes, pl. 37. cites S. C. & S. P. accordingly, but that if a special power is given him, the lease is good. — S. C. cited Arg. Palm. 71. — Cro. J. 84. 85. pl. 8. Arg. S. P. cites S. C. and 13 H. 4. 1. — He may make a lease at will, if he reserves a rent; but if he reserves no rent the lease is void, Arg. and this diversity was agreed by Coke Ch. J. and Doderidge. Roll. Rep. 258, pl. 27. Mich. 13 Jac. B. R. in Case of *Winkfield v. Bell*. — Cro. J. 377. pl. 4. S. C. and per Cur. he may lease at will reserving rent, because it is for his master's profit.

He must not make *leafe* from year to year, of lands usually leased, *in his own* but in his *master's* name. Mo. 70. pl. 191. per Cur. obiter Trin. 6 Eliz.

8. Bailiff of a manor may pay rents issuing out of the manor, and shall have thereof allowance; but contra where he pays the lord's debts due by contract or obligation; for this is out of his power. Br. Baillie, pl. 26. cites 4 H. 7. 14. per Keble.

S. C. & S. P. — Ibid. 282. b. 6. P. by Walfh, cites 4 E. 6. — Palm. 71. Arg. S. C. — S. P. Arg. Cro. J. 178. pl. 16. cites 21 H. 7. 14. 3 E. 2. tit. Avowry. — He may pay rents and wages for improvement of the land. Br. Trespas, pl. 283. cites 12 H. 7. 25. by Frowike.

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S. P. per  
Cur. Ow.  
28. cites 6  
R. 2. —  
Pl. C. 14.  
a. Arg. cites

9. A bailiff may sell deer out of the park. Br. Account, pl. 94. cites 10 H. 7. 6. per Fineux and Keeble.

10. A bailiff has greater interest and authority to meddle, than he that hath a custody. Arg. Cro. J. 84. in Case of Gibson v. Searl, cites 10 H. 7. 21.

A bailiff has  
no interest at  
all, but is as  
a mere ser-  
vant, and

doth things for the profit of his master, although he doth them voluntarily, as 2 E. 4. 4. is, yet it is intended to be done in the name of his master, and in debt thereupon the declaration shall be that the master let; per Williams J. Cro. J. 177. pl. 16. Trin. 5 Jac. in Case of Gibson v. Searle.

Per Yelverton J. a bailiff has authority to meddle with the land, but no interest therein; he has no permanent estate, but is determinable at the lord's pleasure; Fenner J. accorded. Cro. J. 178. pl. 16. Trin. 5 Jac. B. R. Gibson v. Searle.

11. Trespas by the Dean and Chapter of P. against J. A. for cutting of ten load of great wood, and twenty load of underwood; the defendant said that the plaintiffs are seised of the manor of H. of which the defendant is bailiff, where there is a park which has been inclosed with pales time out of mind, and because the park wanted pales, he cut the great wood and made pales and inclosed it, and sold the underwood, and expended the money in wages of those who paled the park, judgment, &c. per Fineux Ch. J. the justification is good without shewing speciality; for there is a diversity where a thing passes from them as a lease for years, or licence to a man to enter their land, and to take trees, &c. and where the act is done for those of the corporation; for in the one case it cannot be without speciality, and in the other e contra. Br. Trespas, pl. 288. cites 12 H. 7. 25.

S. C. cited  
by Dyer. Pl.  
C. 282. b.  
283. a. —  
No licence  
by bailiff is  
good but  
what tends  
ad proficu-  
um of his  
master; per  
Coke Ch. J.  
Roll. Rep.  
258. in Case  
of Wink-  
field v. Bell.

\* Licence by tythe-gatherer to a parishioner, to carry away his corn without setting out his *tythes*. Per Cur. clearly, such licence is void. Noy 134. Brickenden v. Denwood.

12. So of letter of attorney to deliver seisin, and all that which gives interest from them, but contra where no interest is given, but an act done by them as their servant, and the matter of the justification is good; for it belongs to the office of bailiff to improve the manor by his discretion as well as he can, for 'tis sufficient though another may do better. Br. Trespas, pl. 288. cites 12 H. 7. 25.

Bailiff may  
take seisin,  
but cannot  
give seisin;  
per Coke  
Ch. J. Cro.  
J. 142. pl.  
20. Mich.  
4 Jac. B. R.  
in the Case

of Brediman v. Bromley. — Cro. J. 178. pl. 16. S. P. Arg. cites 21 H. 7. 12 H. 7. 14. 3 E. 2. tit. Avowry.

A bailiff may do any thing to his master's benefit, but not to his prejudice without his assent; per Yelverton, to which Fenner agreed. Cro. J. 178. pl. 16. Trin. 5 Jac. B. R.

Bailliff may justify the cutting of great trees to repair a house or the covering of it as it was before, but not of a more costly covering. Br. Baillie, pl. 41. cites S. C.

13. *So of houses or other things incident to it.* Br. Ibid.

Br. Baillie, pl. 41. cites S. C.

14. *And so he may repair the pales.* Br. Ibid.

S. C. — If a bailiff cuts down trees and repairs an ancient pale, this is good; per Cur. obiter. Ow. 28. cites 12 H. 6. [but seems misprinted for 12 H. 7.]

Br. Baillie, pl. 41. cites S. C.

15. *But cannot make a new house which has not been before.*

Br. Ibid.

Br. Baillie, pl. 41. cites S. C.

16. *Nor cover a house with tiles which was thatched before.*

Br. Ibid.

S. P. by

Yelverton, to which Fenner agreed. Cro. J. 178. cites 21 H. 7. 12 H. 7. 14. 3 E. 2. tit. Avowry. [540]

Br. Baillie, pl. 41. cites S. C.

17. *Nor where it has been hedged can he make pales.* Br. Ibid.

S. C. — S. P. he may repair fences, but it must be in such manner as before; per Yelverton, to which Fenner agreed. Cro. J. 178. pl. 16. cites 21 H. 7. 12 H. 7. 14. 3 E. 2. tit. Avowry.

18. *But a bailiff may take agistments to pasture the land of his master.* Br. Ibid. per Countable.

Bailliff cannot give licence to cut down trees;

19. *And he may sell trees if there are great abundances, and repair houses.* Br. Ibid.

per Cur. Cro. J. 377. pl. 4. Mich. 13 Jac. B. R. in Case of Wingfield v. Bell. — Roll. Rep. 258. pl. 27. S. C. & S. P. by Coke Ch. J.

Bailliffs may receive rents of old tenants, but they cannot accept new rents upon change of tenants; per Hobart Ch. J. Hob. 154.

20. *Bailliffs may receive rents, and cut underwood and springs which have not been cut but from seven years to seven years.* Br.

Ibid. per Frowike.

21. *But where a house falls he cannot make a new one.* Br. Ibid.

22. *And per Tremayle, he may sow land which has not been sown before, and make a hedge in defence of it.* Br. Ibid.

23. *A bailiff may take fealty, per Yelverton, to which Fenner agreed.* Cro. J. 178. pl. 16. cites 21 H. 7. 12 H. 7. 14. 3 E. 2. tit. Avowry.

24. *A bailiff may be steward of the same manor; for they may well stand both together; per Yelverton, to which Fenner agreed.* Cro. J. 178. pl. 16. cites 20 H. 8.

Dal. 53. pl. 31. S. C. & S. P. accordingly. — Mo. 51,

52. pl. 152. Eires's Case, S. C. & S. P. agreed accordingly; for the title of entry is a thing eligible in his master, which he may accept of or refuse, and such election does not appertain to the office of a bailiff. — S. C. cited Arg. Palm. 71.

25. *A bailiff cannot enter for condition broken, by reason of his office, unless he has express command to do so; agreed by all.* D. 222. pl. 21. Pasch. 5 Eliz. in the Case of Ayer v. Orme.

Roll. Rep. 26. *Bailiff cannot accept amends for a trespass; per Cur. Cro. J. 377.*

J, 377. pl. 4. Mich. 13 Jac. B. R. in Case of Wingfield v. Bell, 258. pl. 27. cites 5 Rep. 76. in Pilkington's Case, [Trin. 33 Eliz. Nevil v. Segrave.] S. C. of Nevil cited Arg. and Coke Ch. J.

and Haughton said the reason of that Case was, because he cannot discharge the action attached in his master.

27. *Payment by a bailiff shall be sufficient seisin, unless it work a prejudice to the lord, as if the lord has not been seised of his rent in 60 years, and the tenant makes one his bailiff generally of his manor, he cannot, without express commandment of his master, pay this remedyless rent to the lord; for this shall be special prejudice to him, the which a bailiff without commandment cannot do.* Agreed. 6 Rep. 59. a. Hill. 4 Jac. C. B. in Brediman's Case.

28. Bailiffs cannot *enter for non-payment of rent*; per Hobart Ch. J. Hob. 154.

29. He cannot *distrain for amercement* by command of the lord of the manor, or *otherwise than by the precept of the steward* of the Court directed to him; per Cur. Carth. 75. Mich. 1 W. & M. in B. R. Matthews v. Cary. 3 Mod. 137. S. C. & S. P. per tot. Cur. and judgment for the plaintiff in

trespass. — Show. 61. S. C. adjudged; and in all the said books a difference was taken between a justification in trespass and an avowry.

*The End of the* THIRD VOLUME.









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